Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SYBILLE G. WOOTEN,

Petitioner,

vs.

CAROL CAMPBELL, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court ofAppeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. BALLARD
Counsel of Record
JOHN G. MABREY
BIRD, BALLARD & STILL
Attorneys for Petitioner
14 Seventeenth Street
Suite 5
Post Office Box 7009
Atlanta, Georgia 30357
404/873-4696

7276
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause imposes upon state officials an affirmative duty to protect or provide reasonable safety to a child in the officials' legal and physical custody, who is physically placed by the officials in a dangerous situation.

2. Whether the Due Process Clause imposes upon state officials an affirmative duty to protect or provide reasonable safety to a child in the officials' legal custody who has been placed by them in foster care.

3. Whether it was "clearly established" in 1991 that a state agency has an affirmative duty to protect or provide reasonable safety to a child in the agency's legal and physical custody, who is physically placed by an agency employee in a dangerous situation.

4. Whether it was "clearly established" in 1991 that a state agency has an affirmative duty to provide reasonable safety from harm to a child in the agency's legal custody, when the child has been placed by the agency in a foster home.

5. Whether a circuit court panel may resolve a Due Process claim where there are disputed issues of material fact and no substantive discovery has been permitted.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Sybille G. Wooten

Carol Campbell

Nancy P. Gilbert

Douglas G. Greenwell

Ruth Y. Hicks

Patricia Keating

Johnny V. Lewallen

Gail Ormsby

Betty Wrights-Robinson

Estate of Michael Wooten, Third Party Defendant

Joanne Gaynor

Gerald V. Gouge

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The opinion of the Eleventh Circuit Court of Appeals, 49 F.3d 696 (11th Cir. 1995), reproduced herein as Appendix B; and the opinion of the district court, unreported, reproduced herein as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the 11th Circuit was entered on April 6, 1995. A Petition For Rehearing filed by petitioner was denied on May 31, 1995, and the Order is produced herein as Appendix C. This Court has jurisdiction to issue the requested Writ of Certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. XIV, Section 1.

Title 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Parties

Petitioner Sybille G. Wooten is the natural mother of Daniel M. Wooten, the deceased child. At all times material hereto, Petitioner was married to Michael D. Wooten, the natural father of Daniel. Respondents Hicks, Gaynor, Gilbert, Campbell and Keating are caseworkers at the Forsyth County Department of Family and Children Services. Respondents Gouge, Greenwell, Lewallen, Wrights-Robinson and Ormsby are employees of the State and Regional levels of the Georgia Department of Human Resources.

B. Factual Background

This is a Title 42 U.S.C. § 1983 civil action seeking recovery for the abduction and subsequent murder of Daniel Wooten, a four-year-old boy, which occurred after a caseworker placed Daniel with his father, Michael Wooten, for an "unsupervised" visit. On the day of the abduction, the Georgia Department of Human Resources ("DHR") and Forsyth County Department of Family and Children Services ("DFACS"), through its agents, *alone* possessed custody of Daniel.

On the day Daniel was released for the fatal "unsupervised" visit, DHR and DFACS were aware of the following unresolved allegations pending against Mr. Wooten: he had physically

abused Daniel; he had sexually abused Daniel; he had exposed Daniel to sexually explicit materials; he had slept with Daniel in a locked room for two months; he had taken nude photos of Daniel against his will; he had raped Petitioner; he had mentally tortured Petitioner; he had exposed himself and made obscene phone calls to his neighbor; his neighbor had witnessed Mr. Wooten's violent behavior, and Mr. Wooten was an alcoholic. DHR and DFACS also knew Daniel had been abducted by Mr. Wooten *only seven months earlier.*

Daniel's DHR and DFACS case files show that several days before the second abduction, and after the only overnight visit between Mr. Wooten and Daniel, Respondents were aware Daniel's behavior in therapy had become more aggressive. Daniel's case file indicates he stated "he needed his guns and knives if he were going to stay with dad at night and that he did not like the long trip to grandma's house because he was afraid that he was not coming back to mom." DFACS' concern over Daniel's abrupt change in behavior caused the caseworkers to discontinue any further overnight visits between Daniel and Mr. Wooten; however, the January 31, 1991 visit was permitted to take place without any protective supervision for Daniel.

The events leading up to Daniel's second abduction and subsequent murder by Mr. Wooten are as follows. On June 26, 1990, after Mr. Wooten had attempted to strangle Petitioner the Saturday before, Petitioner received an *ex parte* protective order from the Superior Court of Forsyth County, Georgia, giving her custody of Daniel and enjoining Mr. Wooten from coming within 500 yards of either Petitioner or Daniel. Shortly thereafter, Mr. Wooten abducted Daniel from day care and a month later Mr. Wooten was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, DFACS became involved in Daniel's case.

Upon arrival at the scene, DFACS learned of allegations of child abuse made by both Mr. Wooten and Petitioner. However, after evaluating the veracity of the allegations, DFACS decided it would be appropriate to temporarily place Daniel with Petitioner, provided she and Daniel took refuge in a safe place. According to caseworker Gaynor's contact sheet, "If the things about him [Mr. Wooten] are true, then both mother and son would be in danger should he make an attempt to see them."

In their decision to temporarily place Daniel with Petitioner, Daniel's DFACS case file indicates the caseworkers relied heavily upon the opinions of Dr. Frank S. Pittman, III and Nancy Aldridge, both therapists who were familiar with the Wootens' situation.

Dr. Pittman told caseworker Gaynor he felt Daniel would be safe with his mother, and he provided an affidavit stating Petitioner was a "stable, sane, conscientious, perfectly and completely capable person, who was capable of functioning as a good parent." He also said Mr. Wooten was an alcoholic and cited several examples where he mentally tortured his wife; *i.e.*, he [Mr. Wooten] would not let Petitioner have a key to their house, he taped her telephone conversations and would not tell her where he worked.

Caseworker Gaynor learned of Dr. Pittman's concern over the sleeping arrangements between Mr. Wooten and Daniel; Mr. Wooten had been sleeping in a locked bedroom with Daniel for about two months. Ms. Aldridge also disclosed to caseworker Gaynor her suspicions of sexual abuse by Mr. Wooten.

Caseworker Gaynor spoke with Jan Woodcock, the Wootens' neighbor, who stated she had witnessed Mr. Wooten's anger and regular drunkenness firsthand, and had experienced him leaving obscene messages on her answering machine. Ms.

Woodcock recalled an incident when Mr. Wooten exposed his genitals to her after coming into her home drunk and uninvited. She expressed to caseworker Gaynor her unwillingness to become involved in the Wooten matter because of possible retaliation from Mr. Wooten; "she did not want Mr. Wooten to hurt her."

In early August 1990, several days after DFACS became involved with Daniel, the Forsyth County Juvenile Court appointed a guardian *ad litem* for Daniel and awarded physical and legal custody of Daniel to DHR acting through DFACS. DHR and DFACS were also granted the authority to place Daniel. Custody and placement authority was granted for eighteen months and the order provided for reasonable visitation between Daniel and his parents, or if Daniel was placed with one of his parents, between the non-custodial parent and Daniel. The order specifically states the visitation was to be "under the control, direction and *supervision* of DHR and DFACS" (emphasis supplied by Petitioner). After Petitioner filed her § 1983 actions, counsel for Respondents obtained an affidavit from the Juvenile Court judge who now interprets his order as leaving the time, place and manner of visitation to the decision of DFACS.

After obtaining custody of Daniel, DFACS investigated and concluded Petitioner was an appropriate placement resource and elected to place Daniel with Petitioner. In an affidavit prepared to support caseworker Hicks' Motion to Dismiss and/or Summary Judgment, Hicks characterizes this placement as "foster care placement."

Instances from the DHR and DFACS case files which demonstrate Daniel's foster care placement, and which evidence Respondents' control and dominion over Daniel and Petitioner, include, but are not limited to, the following:

(1) On a July 31, 1990 contact sheet, Form 452, after the Juvenile Court awarded custody and placement authority of Daniel to DHR and DFACS, caseworker Gaynor states, "Talked with Ms. Wooten re: placement. The Department is going to let placement remain with her. *There will be restrictions and things that she will need to abide by.*" (emphasis supplied by Petitioner);

(2) On an August 28, 1990 contact sheet, Form 452, caseworker Gaynor reports she explained to Michael Wooten in a telephone conversation that it is not their procedure to check on Daniel daily, that Daniel was in day care, and that the day care center will report *to DFACS* if there are any problems with Daniel;

(3) On a September 7, 1990 contact sheet, Form 452, caseworker Gilbert reports she explained to Michael Wooten during an office meeting that DFACS had Daniel in a day care center and that *they had asked the day care center to notify DFACS* of any suspicious bruising on Daniel or behavior of the mother;

(4) On a September 12, 1990 contact sheet, Form 452, caseworker Gilbert reports she contacted Daniel's day care center and reminded the director to notify *DFACS* immediately should any unusual behavior, marks, etc., become apparent;

(5) On a September 19, 1990 contact sheet, Form 452, caseworker Gaynor reports she visited Ms. Wooten's home "*for the purpose of evaluating Daniel with his mother, the conditions of the home and any other matter which may be deemed important.*" (emphasis supplied by Petitioner);

(6) On a September 19, 1990 contact sheet, Form 452,

caseworker Gaynor reports that she inspected Daniel's ears as a result of a report she had gotten;

(7) On a September 19, 1990 contact sheet, Form 452, caseworker Gaynor reports she discussed the medical attention of Daniel with Ms. Wooten;

(8) A DHR FOSTER CHILD INFORMATION SHEET was prepared for Daniel;

(9) Daniel's DHR FOSTER CHILD INFORMATION SHEET, states he is with his mother and is to "remain in foster care until it is determined he is not at risk.";

(10) On January 22, 1991, a little over a week before Daniel's second abduction, in a letter authored by caseworker Hicks to Daniel's guardian *ad litem*, Hicks refers to Daniel as being in "foster care";

(11) On March 29, 1991, caseworker Campbell submitted a written summary of Daniel's case and the events leading to his death to Linda Darter, Director of Social Services, "in compliance with § 1032 of the Foster Care Manual";

(12) In a final case summary of Daniel Wooten prepared by caseworker Campbell, she reports it is DFACS' belief that the policy of the Division of Family and Children Services, Foster Care Section, § 1001.1 was being followed in Daniel's case.

After custody was obtained by DHR and DFACS, DFACS permitted Mr. Wooten to visit Daniel every other week at their offices *under the supervision* of the caseworkers. During this period, Mr. Wooten made repeated and aggressive contacts with

DHR and DFACS on the local, regional and state levels demanding "unsupervised" visits. Respondent Ormsby, a regional level employee of DHR, described Mr. Wooten as being very difficult to work with.

On November 19, 1990, Mr. Wooten contacted Respondent Gouge, Chief of the Child Protective Services Unit at DHR. During that telephone call Gouge discussed Mr. Wooten's visitation arrangement and he agreed to inquire about the case. Subsequently Gouge contacted caseworker Campbell and told her Mr. Wooten was concerned about the visitation arrangement. Gouge then asked her about the court order under which Daniel's case was proceeding. Afterwards, Gouge asked Respondent Wrights-Robinson, a "Foster Care Specialist" at DHR, to follow up on Mr. Wooten's request.

Wrights-Robinson swore in an affidavit given to support her Motion to Dismiss and/or Motion for Summary Judgment that she learned on November 20, 1990 Mr. Wooten had telephoned the state office regarding his visitation, and that she contacted Respondent Ormsby and passed along Mr. Wooten's request for increased visitation. Respondent Ormsby swears in her affidavit that on November 20, 1990 she spoke with Wrights-Robinson and Mr. Wooten regarding his request for unsupervised visitation. She further states she informed Mr. Wooten of her agreement with the present visitation plan, but that she would review the case.

The next day on November 21, 1990, DFACS caseworkers began to permit "unsupervised" visitation between Mr. Wooten and Daniel. This was done despite the sentiments of caseworker Hicks which were recorded in Daniel's DFACS case file *two days earlier:*

> C W [caseworker] is still not comfortable with what Mr. Wooten might do given ample

opportunity as far as absconding with child.

One week after the "unsupervised" visitation began, on November 28, 1990, Respondent Ormsby recorded in a November 28, 1990 summary of Daniel's case that:

> The agency still considers completely unsupervised visits *risky*. (emphasis supplied by Petitioner).

At no time did Petitioner consent to or approve of the "unsupervised" visitation which took place between Mr. Wooten and Daniel.

On January 31, 1991, caseworker Hicks asked caseworker Keating to pick Daniel up from day care for his scheduled visit with Mr. Wooten because Hicks had a doctor's appointment. Caseworker Keating complied with Hicks' request and brought Daniel to DFACS offices to meet Mr. Wooten. Despite the unresolved allegations pending against Mr. Wooten, prior abduction seven months earlier and recent psychological report from Daniel's therapist, Keating released Daniel into the "unsupervised" physical custody of Mr. Wooten with only instructions for him to return Daniel 2-1/2 hours later.

Mr. Wooten never returned Daniel.

After missing for about two months, law enforcement officials located Mr. Wooten and Daniel in a campground in Arizona, in a locked car with blankets covering the windows. After trying unsuccessfully for two hours to persuade Mr. Wooten to leave the car, officers began to enter the car. Mr. Wooten then shot Daniel in the head and committed suicide.

Several months later, the Forsyth County Child Fatality

Review Team completed its investigation into Daniel's death. Suggestions of all members of the Review Team included:

> Father's visits should have been under the supervision of DFCS previously ordered by the Court. If there is a discrepancy in the interpretation of "Supervised Visits", then that should be clarified.
>
> State office level DFCS should not make visitation/placement decisions or recommendations and/or pressure (indirectly or directly) local agency unless an official appeal is made to them in writing.

Because discovery depositions have not been permitted, Petitioner has not been able to learn who, why and how the state level DFACS employees pressured the local caseworkers in Daniel's case.

In Daniel's DFACS case file there is an entry that appears to be an admission by caseworker Hicks. The entry reads: "Ms. Hicks stated her office was receiving pressure from their state office to let Mr. Wooten have unsupervised visits and get this family into a more normal relationship." Additionally, in Daniel's file maintained by Respondent Gouge, there is a handwritten recording that appears to be an admission and acknowledgment by Gouge: "Father's visits with child should have been supervised by DFCS. This homicide could have been prevented if the visit was supervised." Again, since Petitioner has not been permitted to conduct any discovery depositions, she has been unable to investigate such issues as the contexts in which these entries were made, who from the state office was pressuring DFACS to provide "unsupervised" visitation, why state level personnel were interfering with and pressuring the county DFACS caseworkers to provide "unsupervised" visitation, etc.

Finally, Daniel's DFACS' case file disclosed the fact that caseworkers Hicks and Gilbert *specifically requested the Forsyth County Courts to order supervised* visitation between Mr. Wooten and Daniel *prior* to the January 31, 1991 abduction. These requests are perplexing since it was apparently understood that the juvenile court order awarded complete discretion in determining the methods of visitation between Mr. Wooten and Daniel. Perhaps discovery depositions would have revealed Hicks and Gilbert harbored the same concerns about "unsupervised" visitation as those expressed by Petitioner.

C. Proceedings Below

Petitioner Wooten filed her § 1983 and state law claims against Respondents Campbell, Gilbert, Hicks, Keating and Gaynor on August 27, 1992, and Respondents Greenwell, Lewallen, Gouge, Wrights-Robinson and Ormsby on January 29, 1993. Subject matter jurisdiction in the district court was pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1341, in that Petitioner's claims arise from and are authorized by 42 U.S.C. § 1983.

On November 5, 1992 and February 19, 1993, Respondents moved to dismiss Petitioner's action or alternatively for summary judgment.

On August 23, 1993, the district court *denied* Respondents' motion to dismiss and/or summary judgment Petitioner Wooten's § 1983 claims. Specifically, the district court concluded Wooten had indeed stated a claim under § 1983 upon which relief can be granted for violations of Daniel's Fourteenth Amendment substantive due process rights; the law supporting Wooten's § 1983 claims was clearly established, and a genuine issue of material fact exists on whether Respondents' conduct violated clearly established law. The district court granted Respondents'

motion in regard to Petitioner's state law wrongful death claims, and consolidated Petitioner's § 1983 cases. The district court also granted Respondents' request for leave to add the estate of Michael Wooten as a Third Party Defendant.

The Respondents appealed the district court's ruling.

On April 6, 1995, the Eleventh Circuit reversed the district court and held Petitioner's Complaint failed to state a claim upon which relief could be granted. Petitioner's Petition for Rehearing was denied on May 31, 1995. Petitioner now appeals the circuit court ruling.

To date, Petitioner has not been permitted to depose any of the Respondents to investigate Daniel's foster care placement, qualified immunity or any other issue, or to explore the inconsistencies and contradictions which exist between Daniel's DHR and DFACS case files prepared before this case was filed and the Respondents' affidavits which were prepared to support their motions to dismiss/summary judgment. The only discovery from the Respondents that Petitioner has been permitted to review are responses to the district court's mandatory interrogatories, Daniel's DFACS case file and the personal files of Respondents Gouge, Llewallen and Wrights-Robinson. The aforesaid documents and the testimony of Petitioner Wooten are the only sources of information Petitioner has to rely upon any response to Respondents' motions to dismiss/summary judgment.

REASONS FOR GRANTING THE WRIT

In the tragic case of *DeShaney v. Winnebago County Department of Social Services,*[1] the Court held that state

1. 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

caseworkers had no constitutional obligation to protect Joshua DeShaney from the dangers posed to him by his father, of which the caseworkers were well aware, because the state did not have custody of the boy. "It is the state's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the due process clause," not its failure to protect him from third party harm. *Id.* at 200.

Like Joshua, Daniel Wooten was harmed by his father. However, unlike Joshua's case, Daniel's harm took place while he was *within the custody* of the state. For the following reasons, a writ of certiorari should be issued for this case of first impression to the Supreme Court.

I.

"WHETHER THE STATE[2] HAS A CONSTITUTIONAL OBLIGATION TO PROTECT A CHILD IN ITS PHYSICAL AND LEGAL CUSTODY, WHOM IT SUBJECTS TO A STATE CREATED OR ENHANCED DANGER" IS AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT MUST BE SETTLED BY THE SUPREME COURT.

On the day Daniel was abducted, caseworker Keating picked Daniel up from day care, brought him to DFACS' offices, and placed Daniel in the custody of Mr. Wooten without any protective supervision despite having knowledge of Mr. Wooten's prior abduction of Daniel seven months earlier, and the pending unresolved allegations of child abuse. Petitioner contends the State's legal and physical custody of Daniel

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2. As used here and throughout the Petition, "State" refers to DHR, DFACS, and state and local governmental entities and their agents.

imposed upon it a constitutional obligation to provide Daniel with protection. Petitioner further contends the State's action in creating or enhancing a danger specific to Daniel (placing him with Mr. Wooten without protective supervision) triggered a constitutional duty on its part to provide Daniel with protection from the state created or enhanced risks of harm which ultimately resulted.

DeShaney appears to acknowledge a state's constitutional obligation to protect its legal ward when the state itself engages in conduct that enhances or creates a risk of harm to its legal ward. (*See DeShaney* at 201, "While the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). The circuit courts do recognize state action may violate the Due Process Clause when it creates or enhances the risk of private harm to an individual within state custody. *See Cornelius v. Town of Highland Lake,* 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1784 (1990); *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 341 (1990); *Jones v. Phyfer,* 761 F.2d 642 (11th Cir. 1985). *Cornelius* succinctly articulates the constitutional concept upon which Petitioner relies: "If the state puts a man in a position of danger and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.* at 354.

While the circuit courts recognize "state created or enhanced danger" as a basis for a Due Process violation, no uniform legal standards have been developed to guide the lower courts in reaching this determination. Instead, the courts now simply engage in *factual evaluations* as to whether "state created or enhanced dangers" exist, which arguably should be determined by juries. Because of the inconsistent approaches taken by the lower courts in determining whether a state may be

constitutionally obligated to protect an individual from danger when the state itself engaged in action that created or enhanced the risk of danger to said individual, the Court should intervene and provide an analysis of this question. The Supreme Court's resolution of this issue will clarify the legal boundaries which must be adhered to by states when they obtain custody of endangered children and harmonize lower court decisions which contain substantially similar factual patterns.

II.

"WHETHER THE STATE HAS A CONSTITUTIONAL OBLIGATION TO PROTECT A CHILD IN ITS CUSTODY, WHO IS PLACED BY THE STATE IN FOSTER CARE" IS AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The Supreme Court has recognized the state has a constitutional obligation to provide for basic needs and to supply protection to persons in state custody, such as prisoners[3], arrestees[4], and involuntary committed patients[5]. Six years ago, Chief Justice Rehnquist opined in *DeShaney*[6] that a state's placement of a child in a "foster home operated by its agents" may be a "situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[7]

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3. *Estelle v. Gamble*, 429 U.S. 97 (1976).

4. *Revere v. Massachusetts General Hosp.*, 463 U.S. 239 (1983).

5. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

6. 489 U.S. 189 (1989).

7. *DeShaney*, 109 S. Ct. at 1006 n. 9.

However, he expressed "no view on the validity of this analogy" since it was not presently before the Court.[8]

Daniel Wooten's case now places the foster care analogy before the Court for resolution.

On numerous occasions the circuit courts have addressed the constitutional duties owed by the state to a child in its custody, who has been placed in foster care. Four Circuits, including the Eleventh Circuit, have held that a state has an affirmative duty to protect a child its custody when the child is placed in a foster home and if the state fails to protect the child in its custody, the state deprives the child of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) *cert. denied,* 489 U.S. 1065 (1989); *e.g., K. H. Through Murphy v. Morgan,* 914 F.2d 846, 848-49 (7th Cir. 1990); *Doe v. New York City Department of Social Services,* 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied,* 464 U.S. 864 (1983); *Yvonne L. by and Through Lewis v. New Mexico Department of Human Services,* 959 F.2d 883, 893 (10th Cir. 1992); *see also Griffin v. Johnson,* 899 F.2d 1427, 1439 (5th Cir. 1990); *Lipscomb v. Simmons,* 884 F.2d 1242 (9th Cir. 1989); *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir. 1990). It has been further held, "[t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to *ensure the continuing safety of that environment.* The state's failure to meet that obligation, . . . in the absence of overriding societal interests, constituted a deprivation of liberty under the Fourteenth Amendment." *Taylor* at 795.

Here, the facts are strikingly similar to those in *Taylor, Doe, K.H., and Yvonne.* The State obtained physical and legal custody

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8. *DeShaney,* 109 S. Ct. at 1006 n. 9.

of Daniel, placed him with its agent [Petitioner] in a foster home (albeit Petitioner's home), maintained foster care control and dominion, retained and exercised legal custody, and controlled Daniel's visitation with Mr. Wooten. Despite these facts, the circuit court unilaterally decided the state did not impose any limitation on Daniel's personal liberty or freedom to act, and had no affirmative duty to provide Daniel with protection. As a result, there is now a split of authority amongst the circuits, and within the Eleventh Circuit, in cases involving children within the state's custody who are placed by the state in foster care.

Because the Court has previously recognized the foster care issue as one in need of resolution[9], and there is now a split of authority among the circuit courts which have addressed foster care issues, the Court should grant Petitioner's request for certiorari. The resolution of this issue will ensure there is no confusion amongst state officials in regards to their constitutional duties owed to endangered children within state custody who are placed in foster care, and will provide the lower courts with a uniform analysis of issues which arise in foster care contexts.

III.

THE CIRCUIT COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

A. The Circuit Court Bases Its Decision Upon Factual Error.

In what appears to be an attempt to analyze Petitioner's § 1983 "state created or enhanced danger" claim, the circuit court

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9. *DeShaney*, 109 S. Ct. at 1006 n. 9.

concludes no "special relationship" existed between Daniel and Mr. Wooten, and it recites what it purports to believe are "facts" supporting its decision. First and foremost on its list is "Daniel was in the physical custody of his natural mother when his natural father took him."[10] This factual assertion is incorrect. Daniel was *not* in the physical custody of his natural mother when Mr. Wooten abducted him; instead, he was in the physical custody of caseworker Keating who had picked Daniel up from day care, brought him to DFACS' offices, and placed him in the "unsupervised" custody of Mr. Wooten.

Had the circuit court based its analysis upon facts within the record, it would have had no other choice but to conclude the custodial relationship with Daniel imposed upon caseworker Keating a constitutional obligation to protect him from a known risk of harm, Mr. Wooten. A contrary conclusion would be paramount to approving caseworker Keating's placement of Daniel alone with a known alleged pedophile, or Keating's placement of Daniel in a lion's den, without protection. In those instances, the Due Process Clause surely would not permit the state to absolve itself of responsibility simply because the harm was occasioned by a third party and while Daniel was outside the physical custody of the state employee.

Petitioner respectfully requests the Court to consider her § 1983 claims, and render a decision on the basis of *facts* contained within Daniel's DHR and DFACS case files.

B. The Circuit Court Resolves Disputed Issues of Material Fact Without Permitting Petitioner to Conduct Any Substantive Discovery.

The circuit court assumes the role of fact finder in its decision that Petitioner failed to state a § 1983 claim for relief.

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10. *Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995).

While in this role, the circuit court ignores facts in Daniel's DHR and DFACS' case files which conclusively establish foster care placement which is analogous to *Taylor by and Through Walker v. Ledbetter*[11] (*see* facts cited within subsection B of Statement of Case).

Petitioner contends it is improper for the circuit court to interject itself as fact finder and then ignore facts which evidence Daniel's foster care placement and the state's control and dominion thereof. Further, Petitioner asserts she has a right to conduct discovery into any perceived factual issues prior to their resolution to ensure Petitioner's § 1983 claims are properly presented, heard and resolved. As the case presently stands, Petitioner has not been permitted to conduct any discovery depositions to investigate any factual issues pertinent to her § 1983 claims or to explore the inconsistencies and contradictions which exist between Daniel's DHR and DFACS case files prepared before the case was filed, and the Respondents' affidavits which were prepared to support their motions to dismiss/summary judgment.

Petitioner respectfully requests the Court to grant certiorari and remedy this situation.

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11. 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) *cert. denied*, 489 U.S. 1065 (1989).

CONCLUSION

For the aforesaid reasons, the Court's resolution of the questions presented for review is necessary and urgent, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM L. BALLARD
Counsel of Record
JOHN G. MABREY
BIRD, BALLARD & STILL
Attorneys for Petitioner
14 Seventeenth Street
Suite 5
Post Office Box 7009
Atlanta, Georgia 30357
404/873-4696

Dated: August 29, 1995

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 31, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9158

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

CAROL CAMPBELL, Individually, NANCY P. GILBERT, Individually, RUTH Y. HICKS, Individually, PAT KEATING, Individually, JANE DOE, No. 1, Individually, JANE DOE, No. 2, Individually, JOHN DOE, No. 1, Individually JOHN DOE , No. 2, Individually, JOANNE GAYNOR,

Defendants-Appellants.

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

DOUGLAS G. GREENWELL, JOHNNY V. LEWALLEN, GERALD V. GOUGE, BETTY WRIGHTS-ROBINSON, GAIL ORMSBY, John Doe No. 1, John Doe No. 2, Jane Doe No. 1, and Jane Doe No. 2,

Defendants-Appellants.

Appendix A

No. 93-9324

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

CAROL CAMPBELL, Individually, NANCY P. GILBERT, Individually, RUTH Y. HICKS, Individually, PAT KEATING, Individually, JOANNE GAYNOR,

Defendants-Appellants,

JANE DOE, No. 1, Individually, JANE DOE, No. 2, Individually, JOHN DOE, No. 1, Individually, JOHN DOE, No. 2, Individually,

Defendants.

SYBILLE G. WOOTEN, Individually and as Aministratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

DOUGLAS G. GREENWELL, JOHNNY V. LEWALLEN, GERALD V. GOUGE, BETTY WRIGHTS-ROBINSON, GAIL ORMSBY,

Defendants-Appellants,

Appendix A

JANE DOE, No. 1, JANE DOE, No. 2, JOHN DOE, No. 1, JOHN DOE, No. 2,

Defendants.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellee, Sybille G. Wooten, is denied.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 6, 1995

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Carol CAMPBELL, Individually, Nancy P. Gilbert, Individually, Ruth Y. Hicks, Individually, Pat Keating, Individually, Jane Doe, No. 1, Individually, Jane Doe, No. 2, Individually, John Doe, No. 1, Individually, John Doe, No. 2, Individually, Joanne Gaynor,

Defendants-Appellants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Douglas G. GREENWELL, Johnny V. Lewallen, Gerald V. Gouge, Betty Wrights-Robinson, Gail Ormsby, John Doe No. 1, John Doe No. 2, Jane Doe, No. 1, and Jane Doe No. 2,

Defendants-Appellants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten, Plaintiff-Appellee,

v.

Appendix B

Carol CAMPBELL, Individually; Nancy P. Gilbert, Individually; Ruth Y. Hicks, Individually; Pat Keating, Individually; Joanne Gaynor,

Defendants-Appellants,

Jane Doe, No. 1, Individually; Jane Doe, No. 2, Individually; John Doe, No. 1, Individually; John Doe, No. 2, Individually,

Defendants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Douglas G. GREENWELL; Johnny V. Lewallen; Gerald V. Gouge; Betty Wrights-Robinson; Gail Ormsby,

Defendants-Appellants,

Jane Doe No. 1; Jane Doe No. 2; John Doe No. 1; John Doe No. 2,

Defendants.

Nos. 93-9158, 93-9324.

United States Court of Appeals,
Eleventh Circuit.

April 6, 1995.

* * *

Appendix B

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

DUBINA, Circuit Judge:

Appellants/defendants, officers and employees with the Georgia Department of Human Resources ("DHR"), and the Forsyth County Department of Family and Children Services ("DFACS"), appeal the district court's order denying their motion to dismiss or, in the alternative, motion for summary judgment. Defendants alleged in their motion and contend on appeal that the plaintiff/appellee, Sybille G. Wooten ("Wooten") fails to state a claim upon which relief can be granted and that the defendants are entitled to qualified immunity.[1] Because we hold that Wooten fails to establish the violation of a constitutional right, we reverse the order of the district court denying the defendants' motion to dismiss or, in the alternative, motion for summary judgment.[2]

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

1. Defendants also allege in their motion to dismiss that they are entitled to relief because the present litigation is barred by the "*Rooker-Feldman*" doctrine, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); that Wooten's section 1983 claim is barred by the Eleventh Amendment; and Wooten's state tort claim is barred by sovereign immunity.

2. The district court erred in the first prong of its analysis and, therefore, we need not discuss the remaining defenses raised by the defendants. We note,

(Cont'd)

Appendix B

I. FACTS AND PROCEDURAL HISTORY

This is a tragic case. In June 1990, Wooten received a protective order from the Superior Court of Forsyth County, Georgia, giving her custody of her son, Daniel, and enjoining Daniel's father, Michael Wooten ("Michael") from coming within 500 yards of Wooten or Daniel. Shortly thereafter, Michael abducted Daniel from day care and a month later Michael was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, the county DFACS became involved in Daniel's case and petitioned the county Juvenile Court for temporary legal custody of Daniel.

In August 1990, the Juvenile Court gave custody of Daniel to the DHR acting through the DFACS and also gave the DHR authority to place Daniel. Both of Daniel's parents consented to this custody arrangement. The DHR and DFACS, after an investigation, placed Daniel in Wooten's home and allowed Michael to visit him once every two weeks under the supervision of DFACS caseworkers. Beginning in November 1990, the DHR and DFACS allowed Michael to have unsupervised visits with his son. During a January 31, 1991, unsupervised visit, Michael

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(Cont'd)

however, that *assuming arguendo* there is a violation of a constitutional right, the defendants are clearly entitled to qualified immunity. *See Spivey v. Elliott*, 41 F.3d 1497 (11th Cir. 1995); *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir. 1994) (en banc); *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991). Under the qualified immunity standards, Wooten fails to demonstrate that the defendants violated a clearly established right. It was not clearly established law then or now that these caseworkers could expect to be liable when a child, in their legal, but not their physical custody, is harmed by a natural parent while in the physical custody of the other natural parent. The district court's conclusion that the law is clearly established with regards to this matter relied upon cases dealing with foster care, not with a natural parent. We see a distinct difference in the two situations.

abducted Daniel. Nearly two months later, when police found Daniel and Michael, they discovered that Michael had shot and killed Daniel and then Michael had committed suicide.

Wooten brought this action under 42 U.S.C. § 1983 alleging that the defendants violated Daniel's constitutional rights under the Fourteenth Amendment Due Process Clause by failing to protect him from Michael. Wooten also asserted a state law claim for wrongful death. Wooten alleges that the defendants were reckless in granting Michael unsupervised visits when the evidence showed that Michael posed a significant risk of danger to Daniel. She also alleges that defendants of the state DHR interfered with the county DFACS's management of Daniel's case and required the DFACS to allow Michael to have unsupervised visits with Daniel. The defendants filed a motion to dismiss or, in the alternative, a motion for summary judgment asserting various grounds for entitlement to relief, including qualified immunity. The district court denied the motion, and the defendants appeal that order.

II. ANALYSIS

We note at this juncture that the Rule 12(b)(6) defense and the qualified immunity defense become intertwined. Under Rule 12(b)(6), the defendants can defeat Wooten's cause of action if her complaint fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Under the qualified immunity defense, the defendants are immune from liability if Wooten's complaint fails to state a violation of a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). As the Supreme Court states, "[a] necessary concomitant to the

determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Accordingly, we must first undertake an examination of Wooten's complaint to determine if she possesses a right subject to a constitutional violation. *Id.*[3]

The question we must resolve is whether a substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody except to arrange court-ordered visitation with the non-custodial parent. The substantive component of the Due Process Clause protects only those rights which are fundamental. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). Substantive due process rights are created only by the Constitution, not by state laws. *Id.* "A finding that a right merits substantive due process protection means that the right is protected 'against certain government actions regardless of the fairness of the procedures used to implement them.' " *Id.*

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3. Our court has not specifically stated which analysis comes first—the establishment of a violation of a constitutional right or the establishment of a violation of a 'clearly established' constitutional right (readily analogized to the question: which came first the chicken or the egg?). There are several cases in our circuit and in other circuits, however, which intimate that the first question to be answered in this analytical framework is whether the plaintiff establishes the violation of a constitutional right. *See, e.g., Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993); *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 792 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1814, 123 L.Ed. 2d 445 (1993); *Sivard v. Pulaski Co.*, 17 F.3d 185 (7th Cir. 1994); *Johnston v. City of Houston*, 14 F.3d 1056 (5th Cir. 1994).

(quoting *Collins v. City of Harker Heights*, 503 U.S. 115, ___, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (internal quotations omitted)). Hence, tort law remains largely outside the scope of the substantive due process jurisprudence. *McKinney*, 20 F.3d at 1556.

The district court analogized this case to a foster care situation when it found that Wooten stated a claim for a violation of a constitutional right. This analysis is flawed in one major respect: Daniel was in the physical custody of his natural mother, not in a third-party foster home. Wooten maintained Daniel's clothes, food, and shelter. In a foster care situation, the state places the child, whether voluntarily or not, into the care of persons the state has chosen. These foster families provide for the child's physical needs on behalf of the state. The state exercises control and dominion over the child in a foster care situation and, accordingly, if a child is injured by a foster family, he or she has a section 1983 claim for a violation of a constitutional right. *See Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir.1987) (en banc), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989).

The facts of this case are very similar to the facts in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In *DeShaney*, a minor child was severely beaten by his natural father despite knowledge by state social workers of the father's violent propensities. In rejecting the plaintiff's claims, the Supreme Court held:

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself,

> and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty— which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.

489 U.S. at 200, 109 S.Ct. at 1005-06 (citations omitted).

The Court also noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. at 1003. The purpose of the Due Process Clause is to protect the people from the State, not to ensure that the State protect the people from each other. *Id.* at 196,109 S.Ct. at 1003. "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004.

Appendix B

As in *DeShaney,* Michael was a private actor. Wooten had physical custody of Daniel and had consented to visits by Michael. Wooten took no legal action to prevent the unsupervised out of office visits nor the overnight visit at Michael's parents' home. R 4-7, Exh. 3 & 4. Wooten signed a case panel review which expressly stated that Michael would be allowed two hour visits away from the office. Id. After initially placing Daniel in Wooten's home, the state's only role was monitoring and arranging for the visitation between Daniel and Michael. Wooten maintained the control and dominion of Daniel and could have petitioned the court for a change in the custody and visitation arrangements if she felt Michael posed a risk to Daniel's well-being. Under these circumstances, allowing a child visitation with a natural parent does not so "shock the conscience" as to constitute a substantive due process violation. *DeShaney,* 489 U.S. at 197, 109 S.Ct. at 1004.

Wooten contends that the state and her son had a "special relationship" which imposed an affirmative duty on the state to provide Daniel with protection. *See Jones v. Phyfer,* 761 F.2d 642 (11th Cir. 1985); *Cornelius v. Town of Highland Lake,* 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990).[4] In *Cornelius,* we held that "government officials may be held liable for the deprivation by a third party of a private citizen's due process rights when a special relationship is found to exist between the victim and the third party or between the victim and the government officials." 880 F.2d at 352,. There

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4. There is some question whether this court's holding in *Cornelius* survived the Supreme Court's decision in *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), which held that a voluntary employment relationship, standing alone, does not impose a constitutional duty on government employers to provide a reasonably safe work environment. This panel, however, need not rely upon *Cornelius* in making its decision.

is no special relationship here: Daniel was in the physical custody of his natural mother when his natural father took him; Daniel did not rely solely upon the state for his physical needs and safety; Wooten had access to the courts if she was displeased with the unsupervised visitation; Wooten could have intervened to stop the unsupervised visitation; and Wooten was able to protect Daniel because she had physical custody of Daniel. As noted earlier, the state's sole responsibility was to monitor and arrange Daniel's visitation with Michael.

The Supreme Court has noted that in certain limited circumstances the Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals. In *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court recognized that the Eighth Amendment's prohibition against cruel and unusual punishment requires the state to provide adequate medical care to incarcerated prisoners. The Court reasoned that because the prisoner is unable "by reason of the deprivation of his liberty" to care for himself, it is only fair that the state be required to care for him. *Id.* at 103-104, 97 S.Ct. at 290-91 (quotations omitted). In *Youngberg v. Romeo*, 457 U.S. 307,102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Court extended the *Estelle* analysis holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others. 457 U.S. at 314-325, 102 S.Ct. at 2457-2463. These cases, however, provide no support for Wooten in the present case.

The state did not so restrain Daniel's freedom or hold him against his will to such an extent that a "special relationship" was created. The affirmative duty to protect arises from the limitation

which the state imposes on an individual's freedom to act on his own behalf. The state did not impose any limitation on Daniel's personal liberty or freedom to act. The state placed Daniel in the physical custody of his natural mother and monitored Daniel's visitation with his natural father. The state's obligation did not rise to the level of an affirmative duty to protect because the state did not restrain Daniel's liberty to the extent that it rendered him unable to care for himself. *DeShaney,* 489 U.S. at 200, 109 S.Ct. at 1005-06.

Several circuits have utilized *DeShaney* to find a distinction between situations where a child is totally dependent upon the state for security needs and situations where the primary responsibility for care remains with a natural parent. *See e.g., Maldonado v. Josey,* 975 F.2d 727 (10th Cir.1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *D.R. by L.R. v. Middle Bucks Area Vocational Tech School,* 972 F.2d 1364 (3rd Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Unit School Dist. 11,* 909 F.2d 267 (7th Cir.1990). Each of these cases involved children who were harmed by public school teachers. The plaintiffs in these cases attempted to hold school system officials liable based upon the custodial relationship which existed between the school system and the child, especially in light of state compulsory attendance laws. The courts uniformly held that substantive due process did not furnish the plaintiffs a basis to recover against the school systems because the state had not rendered the children totally dependent upon the state.[5]

The present case is similarly analogous to *DeShaney* and the

5. *See also Wright v. Lovin,* 32 F.3d 538 (11th Cir. 1994) (a child's voluntary school attendance did not create a custodial relationship between himself and the school sufficient to give rise to a constitutional duty of protection).

above-referenced cases to warrant our conclusion that Wooten has no claim under substantive due process. In those cases, like here, the children remained in the physical custody of their parents who were free to take steps to protect them from harms perpetrated by other persons. The key inquiry in this case is whether the county caseworkers controlled Daniel's life to such an extent that Wooten could not reasonably be expected to protect him. The answer is that they did not. Accordingly, Wooten's complaint fails to state a claim upon which relief can be granted and should have been dismissed.

III. CONCLUSION

We are not unsympathetic to Wooten and the tragic circumstances under which she lost her son. In applying the law, however, we cannot be guided by emotions. The facts of this case are similar to those in *DeShaney,* and it is under those principles that we hold that Wooten's complaint fails to state a violation of a constitutional right. We note that our decision does not foreclose other avenues of relief available to Wooten. We must remember that the individual truly responsible for this tragedy is Michael, not the state, for it was Michael who shot Daniel and then killed himself

REVERSED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED AUGUST 23, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION 1:92-cv-2047-MHS

SYBILLE G. WOOTEN

Plaintiff,

v.

CAROL CAMPBELL et al.,

Defendants

CIVIL ACTION 1:93-cv-218-MHS

SYBILLE G. WOOTEN

Plaintiff,

v.

DOUGLAS G. GREENWELL et al.,

Defendants

ORDER

These actions are before the Court on defendants' motions to

dismiss or, in the alternative, for summary judgment. Plaintiff's first action, *Wooten v. Campbell*, No. 1-92-cv-2047, is also before the Court on defendants' motion to add a third-party defendant. The Court's rulings are summarized below.

In March 1991, Daniel Wooten, a minor child, was killed by his father, Michael Wooten. Plaintiff Sybille Wooten is Daniel's mother, who at the time was married to Michael Wooten. Defendants are officers and employees of the Georgia Department of Human Resources ("DHR") and the Forsyth County Department of Family and Children Services ("DFACS").

In June 1990, plaintiff was granted a protective order from the Superior Court of Forsyth County, Georgia, giving her custody of Daniel and enjoining Daniel's father from coming within five hundred yards of plaintiff or Daniel. Shortly thereafter, Daniel's father abducted him from day care and a month later was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, the county DFACS became involved in Daniel's case and petitioned the county Juvenile Court for temporary legal custody of Daniel.

In August 1990, the Juvenile Court gave custody of Daniel to the DHR acting through the DFACS and also gave the DHR authority to place Daniel. Both of Daniel's parents consented to this custody arrangement. The DHR and DFACS then placed Daniel in his mother's home and allowed Daniel's father to visit him once every two weeks under the supervision of DFACS caseworkers. Beginning in November 1990, the DHR and DFACS allowed Daniel's father to have unsupervised visits with his son. During the January 31, 1991 unsupervised visit, Daniel's father abducted him. Nearly two months late, Daniel's father shot and killed Daniel and then himself.

Appendix C

Plaintiff brought these actions under 42 U.S.C. § 1983, alleging that defendants violated Daniel's constitutional rights under the Fourteenth Amendment Due Process Clause by failing to protect him from his father. Plaintiff also asserted a supplemental state claim for wrongful death against defendants. Plaintiff alleges that defendants wrongly granted Daniel's father unsupervised visits with him when the evidence showed that a significant risk of danger existed. Plaintiff also alleges that defendants of the state DHR interfered with the county DFACS's management of Daniel's case and required the DFACS to allow Daniel's father to have unsupervised visits with him. Plaintiff did not sue the State of Georgia, the DHR, or the county DFACS.

Defendants in both actions have moved to dismiss or, in the alternative, for summary judgment on several grounds: (1) plaintiff has failed to state a claim upon which relief can be granted; (2) defendants are insulated by qualified immunity; (3) the present litigation is barred by the *Rooker-Feldman* doctrine; (4) plaintiff's § 1983 claim is barred by the Eleventh Amendment; and (5) plaintiff's state tort claim is barred by sovereign immunity. In both actions, the Court has limited discovery to the issue of qualified immunity. The Court now addresses each of defendants' arguments.

I. QUALIFIED IMMUNITY

The Court first addresses defendants' claims that they are immune from plaintiff's actions and concludes that defendants do not have qualified immunity from these actions.

A. *Standard for Qualified Immunity*

"[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus,

> [c]ourts evaluate the official's conduct under an objective, reasonable person standard; the relevant question on a motion for summary judgment based on a defense of qualified immunity is whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred.

Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1503 (citing *Anderson v. Creighton*, 483 U.S. 635, 642 (1987)). Qualified immunity usually protects all but the plainly incompetent or those who knowingly violate the law. *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Eleventh Circuit follows a two-part analysis for determining whether an official is protected by qualified immunity, the second part of which is further divided into two subparts. *Courson v. McMillian*, 939 F.2d 1479, 1487-88 (11th Cir. 1991). First, the defendant-official must prove that she was acting within the scope of her discretionary authority when the allegedly wrongful acts occurred. *Id.* at 1487. Second, once the defendant-official has satisfied this burden, the burden shifts to the plaintiff to show that the defendant-official lacked good faith, that is, that the defendant-official's actions violated clearly established law.

In the good faith analysis, the court must first determine

whether the law was clearly established when the governmental action in question occurred, that is, the contours of the right must be sufficiently clear that a reasonable official must understand that what she is doing violates that right. *Id.* at 1487-88. Then the court must determine if a genuine issue of fact exists on whether the defendant-official's conduct violated clearly established law. *Id.* While a court must examine the information possessed by the defendant-official at the time of her conduct, the court must not inquire into the defendant-official's subjective intent. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Rather, the relevant question is the objective, albeit fact-specific, question whether a reasonable government official could have believed that her conduct was lawful in light of clearly established law and the information possessed. *Id.*

B. *Applying the Standard*

1. *Clearly Established Law*

The Court concludes that the law supporting plaintiff's § 1983 claim was clearly established at the time of defendants' actions in 1990 and 1991.[1] The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment[2] imposes upon

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1. Applying the qualified immunity standard to the facts in these actions, the Court concludes that no genuine issue of material fact exists on whether defendants were acting within the scope of their authority as officers and employees of the DHR and DFACS when they allowed Daniel's father to have unsupervised visits with his son or when the DHR allegedly interfered with the DFACS's management of Daniel's case. *See infra* note 8.

2. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In this context, the Court is concerned with Daniel's substantive, not procedural, due process rights.

the State affirmative duties of care and protection of certain individuals in certain limited circumstances. *E.g., City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) (State must provide medical care to suspects in police custody); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (State must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (State must provide adequate medical care to incarcerated prisoners).

While the Supreme Court has not held that a State has an affirmative duty to protect a child in its custody,[3] *see DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 201 n.9 (1989), four circuits, including the Eleventh Circuit, have held that a State has an affirmative duty to protect a child in its custody when the child is placed in a foster home and that if the State fails to protect the child in its custody, in the absence of overriding State interests, the State deprives the child of a liberty interest under the Fourteenth Amendment. *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989); *e.g., K.H. Through Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990); *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). Indeed, in a post-*DeShaney* case, the Tenth Circuit has held that, for purposes of qualified immunity, the law is clearly established that a State has an affirmative duty to protect a child once the State takes custody of the child and places him in a foster home. *Yvonne L. by and Through Lewis v. New Mexico Dept. of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992). For these reasons, the Court concludes

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3. The Supreme Court need not address a right for the right to be clearly established law for purposes of qualified immunity. *Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

that the law supporting plaintiff's § 1983 claim was clearly established in 1990 and 1991 when the events here occurred.

Defendants object, arguing that, under *DeShaney,* they are entitled to qualified immunity. The Court disagrees. In *DeShaney,* 489 U.S. at 189, the Supreme Court held that the Fourteenth Amendment does not impose upon the State an affirmative duty to protect a child against private violence from his father. *Id.* at 202. The facts of *DeShaney* are distinguishable from the facts here. There a father who had custody of his son beat his son so severely that the boy was left mentally impaired. *Id.* at 193. While state social workers and local officials knew of the danger to the child, they never had custody of the child and thus had no affirmative duty to protect him from his father. The Court reasoned that Wisconsin had not restrained the child's individual freedom to act on his own behalf and therefore the child's rights were not infringed under the Due Process Clause. *Id.* By contrast, a juvenile court of Georgia gave the DHR and DFACS physical and legal custody of Daniel, and the DHR and DFACS took custody of Daniel, placed him in a foster home (albeit his mother's home), retained legal custody over him, and allowed his father to have unsupervised visits with him.

More important, *DeShaney* is consistent with the Court's conclusion that the DHR and DFACS had an affirmative duty to protect Daniel. In *DeShaney,* the Court stated that determining whether a State has an affirmative duty to protect an individual turns not on whether the State knew of the individual's predicament or expressed its intent to protect the individual but on whether the State has imposed a significant limitation on the individual's freedom to act on his own behalf. 489 U.S. at 200. "[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration,

institutionalization, or other similar restraining of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ." *Id.* By taking Daniel into their custody, the DHR and DFACS so restrained his freedom to act on his own behalf that the protections of the Due Process Clause were triggered and the DFACS had an affirmative duty to protect Daniel.

Finally, the Court in *DeShaney* stated that it did not reach the issue addressed here, whether a State has an affirmative duty when the State takes custody of a child and places the child in a foster home. *Id.* at 201 n.9. Still, the Court allowed that such a situation might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect" and noted that several circuits had so held. *Id.*

Defendants next argue that if the law is clearly established that a State has an affirmative duty to protect a child in its custody in a foster home, this law does not apply because Daniel was harmed outside his foster home, that is, outside the custody of the DHR and DFACS. The Court disagrees. In *Taylor,* 818 F.2d at 791, the State took custody of the child and placed him in a foster home where he was abused.[4] There the court held that "[t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet that obligation, . . . in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment." *Id.* at 795. While the DHR and DFACS placed Daniel in his mother's home rather than in a foster home, the DHR and DFACS retained legal custody of Daniel and

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4. The Court acknowledges that *Taylor* is a pre-*DeShaney* case.

controlled Daniel's father's visits, choosing to allow Daniel's father to have unsupervised visits with his son. Accordingly, the Court finds these facts analogous to those in Taylor and concludes that by taking Daniel into its custody and controlling his visits with his father, the DHR and DFACS created a special custodial relationship with Daniel and therefore could be liable for violating his due process rights by putting him in a position of danger from a private person and failing to protect him. Having concluded that the law supporting plaintiff's § 1983 claim is clearly established, the Court must next decide whether an issue of fact exists on whether defendants' conduct violated clearly established law.

2. *Violation of Clearly Established Law*

The Court concludes that a genuine issue of material fact exists on whether defendants' conduct violated clearly established law. Without considering defendants' subjective intent, the Court must consider the information defendants possessed when they allowed Daniel's father to have unsupervised visits with Daniel. The Court must then ask whether a reasonable government official in defendants' position could have believed that her conduct was lawful in light of clearly established law.

From July 1990 until January 1991, when Daniel was abducted, the DHR and DFACS possessed certain knowledge about Daniel's case. Defendants knew that Daniel's father had accused plaintiff of abusing Daniel. Defendants knew of certain allegations against Daniel's father: that he had physically abused Daniel; that he had sexually abused Daniel; that he had exposed Daniel to sexually explicit materials; that he had slept in a locked bedroom with Daniel for two months; that he had taken nude

photos of Daniel against Daniel's will; that he had raped plaintiff; and that he had strangled plaintiff. (Pl.'s Resp. Defs.' Mot. Dismiss/Summ. J. at 7-8.[5]) Defendants also knew that Michael Wooten was allegedly an alcoholic. Finally, defendants knew that Daniel's father had once abducted him from day care in June 1990, when plaintiff had custody of her son. (*Id.* at 5.)

Next the Court must ask, without considering defendants' subjective intent, whether a reasonable person in defendants' position could have believed that her conduct was lawful in light of clearly established law and the information possessed. The Court concludes that a genuine issue of material fact exists on whether a reasonable government official who had custody of Daniel could have believed that her conduct — allowing Daniel's father to have unsupervised visits with his son — was lawful in light of the information defendants possessed since allowing unsupervised visits could have placed Daniel in a position of danger. Because a genuine issue of material fact exists on whether defendants' conduct violated clearly established law, defendants are not entitled to qualified immunity from these actions.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants also move the Court to dismiss these actions because plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Motions to dismiss for failure to state a claim are not favored and are rarely granted since they test the sufficiency of the complaint; few complaints fail to meet the standard of a generalized statement of facts to which defendant can respond. *Rothner v. City of Chicago*, 929 F.2d 297,

5. *Wooten v. Greenwell*, No. 1:93-cv-218.

302 (7th Cir. 1991); *see Garita Hotel, Ltd. v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992).

Again, defendants argue that plaintiff has failed to state a claim upon which relief can be granted because *Taylor*, 818 F.2d at 791, is inapposite and because the holding in *DeShaney*, 489 U.S. at 189, is controlling. As noted above, the Court concludes that the facts of this action are analogous to the facts in *Taylor* and are distinguishable from the facts in *DeShaney*. Therefore, plaintiff has stated a claim upon which relief can be granted for violation of Daniel's Fourteenth Amendment substantive due process rights under § 1983.

In the alternative, defendants argue for summary judgment on the same grounds. While the Court can convert a motion to dismiss for failure to state a claim upon which relief can be granted into a motion for summary judgment under Rule 56, Fed. R. Civ. P. 12(b), the Court declines to do so in this action because discovery has thus far been limited to the issue of qualified immunity. Therefore, the Court denies defendants' motion for summary judgment.

III. *ROOKER-FELDMAN* DOCTRINE

Defendants next argue that plaintiff's complaint is a collateral attack on a child custody decision that was resolved by the juvenile courts of the State of Georgia and therefore is barred under the *Rooker-Feldman* doctrine. Defendants claim that plaintiff asks the Court to exercise appellate jurisdiction over the state courts of Georgia. The Court disagrees.

Under the *Rooker-Feldman* doctrine, lower federal courts have no power to sit in direct review of state court decisions, and

parties adversely affected by a state court's decision must vindicate their rights in the state appellate courts. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16 (1923). The doctrine prohibits lower federal courts from addressing issues that are "inextricably intertwined" with the state court's adjudication of a claim. *Id.*

Here plaintiff's complaint does not challenge the constitutionality of the Forsyth County Juvenile Court's Order of August 7, 1990, which gave custody of Daniel to the DHR and the DFACS. Instead, plaintiff seeks damages under § 1983 for the infringement of Daniel's Fourteenth Amendment rights under the substantive Due Process Clause for defendants' failure to protect Daniel when he was in their custody. Indeed, the constitutional harm alleged by plaintiff did not arise until March 24, 1991, when Daniel's father murdered him, after the county juvenile court's order. On these facts, the *Rooker-Feldman* doctrine has no application, and the Court declines to dismiss plaintiff's actions for this reason.

IV. ELEVENTH AMENDMENT IMMUNITY

Defendants also argue that plaintiff's action is barred by the Eleventh Amendment since plaintiff seeks to recover damages from the State of Georgia's self-insurance fund. The Court concludes that because plaintiff seeks to impose individual and personal liability upon defendants, the Eleventh Amendment is inapplicable here.

The Eleventh Amendment bars actions in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan,* 415

U.S. 651, 663 (1974). Thus, if a plaintiff seeks damages from the public treasury of a state in federal court, the Eleventh Amendment bars the claim. If, however, a plaintiff seeks to impose individual and personal liability against state officials or employees and does not seek funds in a State's treasury, the Eleventh Amendment does not bar the claim. *Hafer v. Melo,* 112 S. Ct. 358, 364 (1991); *Scheuer v. Rhodes,* 416 U.S. 232, 237-38 (1974). To determine whether a defendant is sued officially or personally, the Court must consider the nature of the liability sought during the course of proceedings. *Lundgreen v. McDaniel,* 814 F.2d 600, 604 (11th Cir. 1987). A plaintiff's complaint need not specify whether defendants are being sued personally, in their individual capacities, or both. *Id.*

Here plaintiff's complaints bring suit against the defendants as individuals, not against the State of Georgia, the DHR, or the DFACS. In *Wooten v. Campbell,* No. 1:92-cv-2047, plaintiff's prayer for relief seeks damages from defendants "jointly and severally." (Pl.'s Compl.) In *Wooten v. Greenwell,* No. 1:93-cv-218, plaintiff seeks damages from defendants "in their individual capacities." (Pl.'s Compl. at 10.) The essence of plaintiff's action then is that defendants should be individually and personally liable for their failure to protect Daniel from his father's violence. On these facts, the Court is satisfied that plaintiff seeks judgments against defendants in their individual and personal capacities, not in their official capacities. Therefore, under *Hafer,* the Eleventh Amendment does not bar this action against defendants.

V. PLAINTIFF'S SUPPLEMENTAL WRONGFUL DEATH CLAIM

Finally, defendants argue that the Court should dismiss

plaintiff's wrongful death claim brought under state law.[6] Because different legal standards apply to the state DHR and the county DFACS, the Court concludes that only the state DHR defendants are immune from plaintiff's state law tort claim.

Defendants first argue that the Court should not exercise supplemental jurisdiction over plaintiff's state tort claim. Under 28 U.S.C. § 1367, federal district courts have supplemental jurisdiction over all other claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The Court is satisfied that plaintiff's wrongful death state tort claim against defendants is so related to plaintiff's § 1983 claim that the two claims form part of the same case or controversy. Therefore, the Court declines to dismiss plaintiff's state law claim for this reason.

Defendants next argue that the Court should dismiss plaintiff's state law tort claim because, under Georgia law, plaintiff is barred from bringing her state tort claim against defendants. Under the Georgia Tort Claims Act, O.C.G.A. §§ 50-21-2 to -35 (Supp. 1993), a state officer or employee who commits a tort while acting within the scope of her official duties or employment is immune from suit. *Id.* § 50-21-25(a). Still, a plaintiff may recover damages for the officer or employee's tort from the State itself because the State has waived its sovereign immunity for actions brought in state courts.[7] *Id.* § 50-21-23(a)-

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6. Since plaintiff's wrongful death tort claim against defendants is an issue of substantive state law, the Court must apply Georgia law to this claim. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Georgia courts recognize a tort action for the wrongful death of a child. O.C.G.A. § 51-4-4 (1982).

7. The State of Georgia has not waived its Eleventh Amendment immunity for actions brought in federal court. O.C.G.A. § 50-21-23(b).

(b). To recover, then, a plaintiff must bring her state law tort action in the state courts, but must name not the individual officer or employee but the state government entity as the party defendant. *Id.* § 50-21-23(b), -25(b). Nonetheless, a plaintiff can recover only for the torts of "State" officers and employees, and "State" does not include "counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities." *Id.* § 50-21-22(5), (7).

Applying the Tort Claims Act to these facts, the Court concludes that the Act protects the state DHR defendants from plaintiff's state law tort claim, but does not protect the county DFACS defendants from plaintiff's claim. Georgia law requires plaintiff to bring her state law tort action against the state DHR defendants in the state courts and to name the DHR as the party defendant, and this Court may not create a right where none exists in state law. Plaintiff then may not recover on her state law tort claim against these defendants since, under the Act, they are immune from plaintiff's claim.[8] Therefore, the Court dismisses plaintiff's wrongful death claim against the state DHR defendants.[9]

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8. Presumably, plaintiff could sue these defendants in their individual and personal capacities in state or federal court for the tort of wrongful death if defendants had acted outside the scope of their employment. The parties, however, do not contest, and no evidence shows, that these defendants acted within the scope of their employment when they allowed Daniel's father to have unsupervised visits with his son. Neither party has contested that the state DHR defendants were acting within the scope of their employment. The state DHR is an institution of the State of Georgia that has the power to accept for casework services and care all children and youths placed in the legal custody of the DHR by Georgia courts. O.C.G.A. §§ 49-2-5, 49-5-8 (1990 & Supp. 1993).

9. *Wooten v. Greenwell*, No. 1:93-cv-218.

Appendix C

VI. DEFENDANTS' MOTION TO ADD THIRD-PARTY DEFENDANT

Defendants in the action *Wooten v. Campbell,* No. 1:92-cv-2047, move the Court to add the Estate of Michael David Wooten as a third-party defendant to this action. The Court grants defendants' unopposed motion.

Under Federal Rule of Civil Procedure 14, a defending party may implead a third-party defendant when the third-party defendant may be liable to the defending party for all or part of the plaintiff's claim against the party. Fed. R. Civ. P. 14(a). A defending party may assert a third-party claim when the third-party defendant's liability is dependent on the outcome of the main claim or when the third-party defendant may be secondarily liable to the defendant. *See Southeast Mortgage Co. v. Mullins,* 514 F.2d 747, 749 (5th Cir. 1975).[10] Also, the defendant's right to relief must exist under the applicable substantive law. *See Kim v. Fujikawa,* 871 F.2d 1427 (9th Cir. 1989).

Since defendants argue that Michael Wooten was the proximate cause of Daniel's death, Michael Wooten's Estate could be liable to defendants for all or part of plaintiff's claim against them. Thus, the Estate's liability depends on the outcome of plaintiff's claims that defendants were the proximate cause of Daniel's death. On plaintiff's state tort law claim, Georgia law recognizes a right of contribution for joint tortfeasors. O.C.G.A. § 51-12-32 (1982); *Evans v. Lukas,* 140 Ga. App. 182 (1976). For these reasons, the Court grants the motion of defendants in *Wooten v. Campbell,* No. 1:92-cv-2047, to add the Estate of Michael Wooten as a third-party defendant.

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10. In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit before September 30, 1981.

Appendix C

VII. CONSOLIDATION OF CASES

In the interest of judicial convenience and economy and after concluding that these actions present common issues of law and fact, the Court sua sponte consolidates these two actions for trial. Fed. R. Civ. P. 42(a). Consolidation "does not merge the suits into a single suit, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). *See generally* Charles A. Wright & Arthur R. Miller, 9 *Federal Practice and Procedure* §§ 2381-86, at 252-76 (1971 & Supp. 1999).

VIII. CONCLUSION

The Court's rulings are summarized as follows:

A. In *Wooten v. Campbell*, No. 1:92-cv-2047, the Court DENIES defendants' motion to dismiss or, in the alternative, for summary judgment [##14-1, 14-2].

B. In the action *Wooten v. Greenwell*, No. 1:93-cv-218, the Court GRANTS IN PART and DENIES IN PART defendants' motion to dismiss or, in the alternative, for summary judgment [##8-1, 8-2]. The Court dismisses plaintiff's wrongful death claim against defendants in this action.

C. In the action *Wooten v. Campbell*, No. 1:92-cv-2047, the Court GRANTS defendants' motion to add the Estate of Michael Wooten as a third-party defendant in this action [#15-1].

Appendix C

D. Finally, the Court DIRECTS the Clerk to consolidate these actions.

IT IS SO ORDERED, this 19th day of August, 1993.

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

(2)

Supreme Court, U.S.
F I L E D
SEP 28 1995

No. 95-356

In The

Supreme Court of the United States

October Term, 1995

SYBILLE G. WOOTEN,

Petitioner,

v.

CAROL CAMPBELL, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. BOWERS
Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

WILLIAM M. DROZE
Assistant Attorney General
Counsel of Record

Please Address All Communications To:

WILLIAM M. DROZE
Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 651-6198

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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I. QUESTION PRESENTED

A. Whether a state's mere retention of legal custody of a child who has been placed in the physical custody of a natural parent represents a restraint of liberty to the degree that the child or his caregiver parent is dependent upon the state for all essential care for the child such that the substantive component of the Due Process Clause is triggered?

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IV. STATEMENT OF THE CASE

Sybille Wooten (hereafter "Petitioner") and Michael Wooten were the natural parents of Daniel Wooten, age four. Petitioner complained of numerous marital difficulties with her former husband. On June 26, 1990, Petitioner determined on advice of counsel that she should take her son from day care and seek to dissolve her marriage. When she arrived at the day care center, she was informed that she could not pick up her child because of a prior custody order which existed in earlier divorce proceedings that ultimately were abandoned by the parties. Upon learning that she could not obtain the child, Petitioner went to superior court to file legal proceedings to dissolve her marriage and to obtain custody. In the interim, Michael Wooten was notified by the day care center that Petitioner had tried to take the child and went to pick him up. According to a day care worker, Michael Wooten had no knowledge of any court order denying him access to Daniel at the time he picked up the child.

Petitioner filed a complaint for divorce in the Superior Court of Forsyth County on June 26, 1990, and also filed a petition alleging the existence of family violence and claiming that custody of Daniel should immediately be awarded to her. The Court entered an order *ex parte* requiring Michael Wooten to appear on August 2, 1990 to answer the allegations of the divorce, and an *ex parte* temporary protective order requiring him to appear before the court on July 5, 1990, on the family violence issues. Petitioner was unable to locate either Michael Wooten or Daniel to obtain service of the court papers, and on July 5, 1990, amended her complaint for divorce

citing her service efforts and praying for an order for service by publication and for law enforcement officers to locate and take custody of the child. The superior court issued another *ex parte* order granting Petitioner's request that the child be apprehended and placed in her custody. On July 11, 1990, the superior court ordered Michael Wooten served by publication in the divorce action.

Michael Wooten was arrested in Forsyth County, Georgia, on July 27, 1990, on an interference with custody warrant and Daniel was taken to the Forsyth County Department of Family and Children Services (hereafter "Forsyth County DFCS"), to await his mother. At that time allegations against Petitioner surfaced concerning her physical and sexual abuse of Daniel. Consequently, Mr. Mike Jones and Respondent Joanne Gaynor, a social services specialist, interviewed Daniel about the alleged abuse. Petitioner was also interviewed concerning these allegations and denied them. In the interview, Petitioner expressed shock that Michael Wooten had been arrested since it was her understanding that he had planned to deliver Daniel to her or would appear with the child in court on the date originally scheduled by the superior court for his appearance.

Mr. Jones and Respondent Gaynor investigated the allegations of abuse against Petitioner to the extent possible, and conferred with Respondent Nancy Gilbert, a casework supervisor senior, and Petitioner's attorney about the situation. While the investigation continued, the Forsyth County DFCS filed a complaint for deprivation with the Juvenile Court of Forsyth County on July 27, 1990, noting Michael Wooten's arrest and the allegations of abuse against Petitioner. The juvenile court

reviewed the affidavit of Mr. Jones for the temporary detention of Daniel in light of the allegations. Based on all the evidence, the juvenile court granted temporary custody of Daniel to Forsyth County DFCS pending a 72-hour hearing. Ultimately, Forsyth County DFCS concluded that Daniel's best interest would be served by allowing him to go with Petitioner rather than being placed in foster care. Although Petitioner was permitted to take Daniel, both she and her attorney agreed to appear at the 72-hour court hearing with Daniel and not to remove him from the shelter Petitioner had selected for her temporary residence.

By agreement of all parties, the juvenile court hearing to determine Daniel's custody was held on July 31, 1990. Following the hearing, the juvenile court issued an order on August 7, 1990, finding that Daniel showed signs of great stress and that it was in his best interest to remain in the temporary custody of Forsyth County DFCS. Both parents agreed to this arrangement. The juvenile court authorized Forsyth County DFCS to determine where Daniel should be placed according to his best interests, and ordered that visitation was to be arranged with the parents. The order specified that "Such visitation shall be under the control and direction of the [Forsyth County DFCS], and under its supervision." The court construed its order as not restricting visitation and leaving the time, place and manner of visitation to the discretion of Forsyth County DFCS.

In accordance with departmental policy, a 30-day case plan was established for Daniel which allowed him to remain in Petitioner's custody and to provide for visitation with Michael Wooten every other week at the

agency's office. The case plan was developed by Respondent Gaynor and the caseworker assigned to Daniel's case, Respondent Ruth Y. Hicks, with input from the parents. Mr. Wooten objected to the "supervised visitation" arguing that it was not a court-ordered requirement, and Respondent Hicks explained that "the court order left visitation to the control of the Department and that the development of this case plan was derived from the court order."

To follow up on his complaints regarding visitation, Michael Wooten telephoned Respondent Betty Wrights-Robinson in August, 1990, to complain about the placement of his child with Petitioner and making abuse allegations against her. Respondent Wrights-Robinson was a child protective services consultant who provided training, technical assistance and case consultation regarding general program and policy issues to state, regional and county staff. She also received complaints from the public regarding Child Protective Services cases. After the phone call, Respondent Wrights-Robinson gathered information about the case, and telephoned Respondent Gail Ormsby at the region level to find out what the status of the case was.

At all times relevant to this lawsuit, Respondent Ormsby was the senior field representative for Region II of the Division of Family and Children Services, which included the Forsyth County DFCS. Respondent Ormsby's specific duties while working in Region II were to function as social services coordinator for county staff in thirteen north Georgia Department of Family and Children Services offices. She provided monitoring, consultation, and training on all social services programs and also

provided technical assistance, as needed, in difficult and unusual cases. Respondent Ormsby became familiar with the Wooten case by virtue of her role as social services coordinator.

Respondent Ormsby stated that she would have Respondent Carol Campbell, director of Forsyth County DFCS, contact Respondent Wrights-Robinson about the case, although the two never actually spoke. Instead, Respondent Wrights-Robinson spoke with Respondent Gilbert at the local office on September 12, 1990, about the case. Respondent Gilbert and Respondent Wrights-Robinson discussed various options concerning the visitation arrangements in the Wooten case. Respondent Gilbert also agreed to forward a copy of the case record to Respondent Wrights-Robinson for further review. Respondent Wrights-Robinson did not attempt to control or direct the county staff in setting visitation for Mr. Wooten.

On September 13, 1990, Respondent Wrights-Robinson received further information on the case from Respondent Ormsby via electronic mail. Respondent Wrights-Robinson spoke with Mr. Wooten again on September 17, 1990, when he called to say that Daniel was showing signs of stress in his current placement and that he might not be receiving adequate health care. Mr. Wooten expressed concern in that conversation that Respondent Wrights-Robinson was not as interested in his case as she had appeared in August, 1990. Nevertheless, Respondent Wrights-Robinson attempted to follow up on the phone call with Respondent Ormsby on September 18, 1990, but was unable to contact her.

In September, 1990, Michael Wooten also telephoned Respondent Gerald V. Gouge expressing concerns about the management of Daniel's case. Respondent Gouge is the chief of the Child Protective Services Unit and his duties include supervision of four consultants in that unit, including Respondent Wrights-Robinson. Respondent Gouge shared Mr. Wooten's concerns with Respondent Wrights-Robinson.

The Forsyth County DFCS continued to oversee the visitation plan pending the outcome of the parents' divorce proceedings. A hearing in the divorce proceedings was held on October 9, 1990, and at that time Mr. Wooten's psychologist, Dr. Guy Jordan, wrote to the court and suggested that more liberal visitation would be in the best interest of Daniel. The superior court issued its order on October 23, 1990, simply adopting the juvenile court's custody order which gave Forsyth County DFCS discretion about visitation and established a child support obligation for Michael Wooten.

Michael Wooten telephoned Respondent Gouge again in November, 1990. In response to a request from Mr. Wooten, Respondent Gouge called Respondent Campbell to inquire about the visitation schedule and to ask about a possible visit over the holidays which Mr. Wooten wanted. He asked Respondent Wrights-Robinson to follow up on the call. Respondent Gouge did not attempt to control or direct the county staff in setting visitation for Mr. Wooten. He did not recall speaking with anyone about Daniel's case after November 20, 1990.

When Respondent Gouge asked her to follow up on the November, 1990 telephone call he received from Mr.

Wooten, Respondent Wrights-Robinson called Respondent Ormsby and passed along Mr. Wooten's request that he be allowed longer visitation with his son and that he be permitted a visit with him over the holidays. However, she did nothing more than communicate this request. At no time did she direct that additional visitation or visitation away from agency offices be permitted. Like Respondent Gouge, Respondent Wrights-Robinson recalls no further contact with anyone about the Wooten case after November 20, 1990.

During this time period, Respondent Ormsby had discussions about the Wooten case with Respondent Wrights-Robinson and county staff of the Forsyth County DFCS due to its complexity and the allegations being leveled by both parents. She remembers a call from Mr. Wooten on November 20, 1990, in which he complained about the visitation arrangements with Daniel. Respondent Ormsby informed Mr. Wooten at that time that she was in agreement with the visitation plan implemented by the county staff, but that she would review the record at his request. At no time during any of the conversations with the county staff did Respondent Ormsby instruct or direct that action be taken in the Wooten case or that more liberal visitation be allowed. Defendant Ormsby does not recall any specific conversations about the case after November 20, 1990, although she did prepare a summary of the case for the state office on November 28, 1990.

After several months of uneventful visitation in the agency's offices, Mr. Wooten was permitted to take the child away from the office for two-hour periods. Petitioner was aware of the visitation away from the office.

Mr. Wooten always complied with instructions to report his whereabouts with Daniel and always returned the child promptly. Based upon his record of compliance, Mr. Wooten was permitted to exercise visitation without continuously calling Respondent Hicks to report his location during the out-of-office visits.

On November 27, 1990, Daniel's caseworker, Respondent Ruth Hicks, contacted Mr. Wooten's psychologist, Dr. Guy Jordan, and told him that Mr. Wooten was pressing for more liberal visitation. Dr. Jordan told Respondent Hicks that he thought additional visitation would benefit Daniel and would not endanger the child. Dr. Jordan later provided Respondent Hicks with a letter confirming his opinion that overnight visitation was acceptable. Appendix, p. 8a. Respondent Hicks also required Mr. Wooten to submit written references supporting his character prior to allowing an overnight visit with Daniel. The overnight visit was discussed with Petitioner on December 11, 1990 and she took no action to prevent the visit.

On December 26, 1990, Mr. Wooten was permitted one overnight visit with Daniel at Mr. Wooten's parents' home after it had been inspected by another DFCS office. Although the agency's offices were closed due to inclement weather the day Mr. Wooten was to return the child from the overnight visit, Mr. Wooten returned Daniel to Petitioner directly on the appointed day.

The superior court entered another temporary order on January 2, 1991, continuing Forsyth County DFCS' authority to arrange visitation. There is no indication that Petitioner contested the Forsyth County DFCS' practice of allowing visits outside its offices, or even the overnight

visit. On January 30, 1991, Petitioner and Michael Wooten attended the six month case panel review during which time visitation was addressed. The parties agreed that Daniel could visit at Mr. Wooten's home after a home evaluation was done. The case panel review signed by the Petitioner expressly stated that "[i]n the interim Mr. Wooten will be allowed 2 hr. visit (sic) away from the office." Appendix, p. 5a. The following day Respondent Patricia Keating, a caseworker acting in Respondent Hicks' absence, picked up Daniel from day care for his scheduled visit with Mr. Wooten. As agreed upon in the case panel review, Mr. Wooten was permitted a two-hour visit with Daniel away from the Forsyth County DFCS office and was instructed to return at 4:30 p.m. Although Mr. Wooten gave Respondent Keating no indication that he would not return at the appointed time, he failed to return the child.

When Michael Wooten did not return Daniel, Forsyth County DFCS contacted the police and took immediate steps to attempt to locate him. When it became apparent that Michael Wooten had fled the jurisdiction, Forsyth County DFCS scheduled an expedited proceeding in juvenile court on February 8, 1991, to prohibit further contact between Michael Wooten and Daniel and to obtain an order directing law enforcement officers to locate and obtain custody of Daniel. That order was entered on February 11, 1991. Approximately two months later, on March 24, 1991, Michael Wooten shot and killed Daniel and then himself when the Arizona State Police stormed their car at a campground in Portal, Arizona.

Based upon the existing record, Respondent Johnny V. Lewallen and Respondent Douglas Greenwell had no involvement with this case whatsoever.

Petitioner places great reliance on the findings of the "Forsyth County Child Fatality Review Team" without even describing to the Court what that report represents. The report was prepared pursuant to Georgia statute, O.C.G.A. § 19-15-3 *et seq.*, for the purpose of making recommendations for improving child care, not for finding fault. Petitioner omitted the fact that by law persons preparing the report, and any records used in preparing it, are unavailable in any civil or criminal proceeding, making its findings effectively unreviewable, not subject to cross-examination by Respondents, and arguably inadmissible. O.C.G.A. §§ 19-15-7(e),(f). *See Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 192 (5th Cir. 1990) (admissible evidence required to defeat summary judgment).

Even more significant though is that Petitioner only provided the Court with a portion of the report's findings, leaving the false impression that the death review team faulted the Respondents for the death of Daniel. The team noted in the report that services provided by Forsyth County DFCS were "appropriate". Appendix, p. 11a. Further, the members of the team could not even agree as to whether Daniel's death was preventable. They checked both "Probably" and "Probably Not" in the Section IX where they were required to make the decision about preventability. *Id.* The section of the report quoted by Petitioner, *see* Petition, p. 10, was simply a suggestion for future cases, not a finding of fault as to the handling of

this case. Moreover, Petitioner failed to mention recommendations made by the death review team: "***Give immunity to DFCS workers.*** Fear of legal liability is uppermost in their minds and takes precedent [sic] over interest of the child." (Emph. Supp.). Appendix, p. 13a.

The team also recommended that local case managers should have more latitude in making decisions on their cases. Appendix, p. 13a. By quoting from only sections of the report, and omitting other significant portions, Petitioner has not been candid with the Court concerning the nature and impact of this report which she treats as gospel.

Petitioner states as fact that Respondent Gouge admits and acknowledges in a handwritten note that the visits between Mr. Wooten and Daniel should have been supervised and that Daniel's homicide could have been prevented if the visit had been supervised. Petition, p. 10. First and foremost, Respondent Gerald Gouge did not even write the note as is clearly disclosed by a difference in handwriting. Thus, contrary to Petitioner's representation, Respondent Gouge did not admit or acknowledge anything. In addition, the note is in actuality just a summary of the fatality report of the death review. Petitioner leads this Court to believe that Respondent Gouge has all but admitted liability, when in reality the cited document is just a summary of a report which was prepared by the death review team, not by one of the Respondents. This departure from the record is shocking enough, but it is not an isolated occurrence.

Petitioner has also been less than candid concerning the statement attributed to Respondent Ruth Hicks about

pressure from state level workers, *see* Petition, p. 10. Petitioner suggests that Respondent Hicks "admitted" pressure was being applied. *Id.* If the Court examines the document cited by Petitioner for this proposition it will find that it is a note written by some unidentified person who was assisting in the search for Daniel. There is no attribution of these notes to any of these Respondents. At best then, the document is a hearsay report of a statement of Respondent Hicks, not a statement she made in the course of any proceeding.

More troubling though is Petitioner's omission, yet again, of the portion of the notes necessary to put the cited statement in context. The recorder, whoever he or she may be, noted that Michael Wooten had enjoyed visits without caseworkers being present on other occasions and that he had brought Daniel back each time. It is also noted that overnight visitation had been allowed without incident. *Id.* Finally, and perhaps most important is the following exchange:

> I ask [sic] Ms. Hicks why Mr. Wooten was allowed an unsupervised visit with Daniel if they knew he had already taken the child in July of 1990. Ms. Hicks replied "Because I'm not a professional" she then took a letter from her file and showed it to me. The letter was a report from Dr. Guy Jordan. Dr. Jordan, Mr. Wooten's doctor, had seen Mr. Wooten and had done a psychological evaluation. *This letter indicates Mr. Wooten wasn't a threat to Daniel and it was his opinion that Mr. Wooten could be allowed to see Daniel unsupervised . . .*

(Emph. Supp.). The quoted language, shows that Respondent Hicks was relying on professionals in the psychological field to provide her with information necessary to manage the visitation, not caving in to state level pressure. Neither is it unreasonable that Respondent Hicks elected to rely more heavily upon the views held by Dr. Guy Jordan, a licensed psychologist, rather than Petitioner's therapist, Nancy Aldridge, who was only a licensed clinical social worker. Respondent Hicks not only had the support of Dr. Jordan, but knew that if Michael Wooten fled he would forfeit his bond which was secured by his parent's home. She had references praising Michael Wooten, and even a prior psychological evaluation in his behalf by a psychologist who had treated both parties during past marital difficulties.

V. SUMMARY OF THE ARGUMENT

The court of appeals properly held that Petitioner's complaint did not state a claim for relief against the Respondents where she relied upon substantive due process principles and Daniel Wooten's liberty was not so restrained by these Respondents so as to substitute them as his primary caregiver. Substantive due process protection is only triggered when the state restricts a person's liberty to the point that he can no longer protect himself without action being taken by the state. Daniel Wooten was not placed with a foster family, he was placed in the custody of his mother, Petitioner. Consequently, the facts here are more similar to cases where the state temporarily oversees the conditions of a person, as in a public school, and not those cases where complete control of a child is

transferred to a foster family. Substantive due process does not furnish Petitioner a claim on these facts.

It is also significant that the court of appeals determined that even if such a cause of action did exist, these Respondents are "clearly entitled to qualified immunity." Petition, App. at 6a, n.2.

VI. REASONS FOR DENYING THE PETITION

A. The Court Of Appeals Properly Held That The Complaint Failed To State A Claim For Deprivation Of Substantive Due Process Where The Child Was Not In The Physical Custody Of The Respondents And No Significant Liberty Restraint Was Imposed.

This appeal presented a question of first impression to the Eleventh Circuit: is a substantive due process right implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody other than to arrange for court-ordered visitation with the non-custodial parent? With respect to such questions, this Court has expressed reluctance to expand the universe of rights actionable under the substantive due process clause finding that "the guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Albright v. Oliver*, 510 U.S. ___, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114, 119 (1994) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). The facts of this case, as the court of appeals correctly reasoned, do not justify expansion of substantive due process here.

This Court has counseled that before qualified immunity analysis becomes necessary, courts should first identify whether a plaintiff possesses a right subject to

violation in a constitutional sense. *Siegert v. Gilley*, 500 U.S. 226 (1991). The court of appeals properly held that Respondents could not be charged with deliberate indifference to the needs of Daniel Wooten under the Fourteenth Amendment or the Eighth Amendment where they did not maintain physical custody of the child. The validity of this distinction is self-evident given that Petitioner by her own admission in the complaint focused on the "physical custody" of Daniel, not his legal custody. The Respondents did not have the custodial relationship with Daniel that is typical of a foster care placement. As a result, this case must be analyzed differently from a situation where a child is injured by the acts of a state actor or where the child's liberty is restrained by being placed in a foster home.

In *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989), which explored the outer confines of due process rights in the context of custodial care, a minor child was severely beaten by his natural father despite knowledge by state workers of the father's violent propensities. In rejecting the plaintiff's claims, this Court opined:

> when the State by the affirmative exercise of its power so restrains an individual's liberty that *it renders him unable to care for himself*, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [Cit.Om.] *The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him,*

> *but from the limitation which it has imposed on his freedom to act on his own behalf.* [Cit.Om.] In the substantive due process analysis, **it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted *by other means*.**

DeShaney, 489 U.S. at 200. (Emph./Ital. Supp.).

Upon recognizing that the liberty of the minor child had not been sufficiently restrained so as to substitute the state as the provider of necessities to the child, the Court concluded that no liability should attach. In reaching this conclusion, the Court was not unmindful of the injury which had befallen the plaintiff. As the Court said, "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father." *Id.* at 203.

The essence of Petitioner's complaint against these Respondents is that they were deliberately indifferent to the needs of Daniel. In making this allegation, Petitioner attempts to articulate the constitutional requirements for care of imprisoned or institutionalized individuals. In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court adopted the "deliberate indifference" standard finding that a prisoner's rights could be violated if prison officials were

deliberately indifferent to his needs. The Court's analysis in *Estelle* turned on whether such conduct constituted cruel and unusual punishment under the Eighth Amendment.

Although the Eighth Amendment would be inapplicable in the present circumstances since Daniel was not a prisoner, Petitioner apparently relies upon similar principles which have been applied to the involuntarily committed. *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (mental hospital); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc) (foster home). The Eleventh Circuit has recognized that where a child is injured while in foster care an action will lie under 42 U.S.C. § 1983 for redress of that injury. *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). In *Taylor*, the Court was faced with a situation where a child was removed from the custody of her natural parents, was placed with a foster family, and was subsequently injured by the foster mother. *Id.* at 792. On these facts, the court declined to dismiss the plaintiff's action under 42 U.S.C. § 1983 holding:

> if foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interests may show a deprivation of liberty . . . the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety **of that environment.**

Taylor, 818 F.2d at 795 (Emph. Supp.). As is evident from the foregoing passage from the opinion, the facts in this

case are significantly different. Here, the child was placed in the care of the Petitioner, not a foster family. Thus, there existed no custodial environment for the Respondents to police as there was in *Taylor*. *Compare Spivey v. Elliott*, 29 F.3d 1522, 1526 (11th Cir. 1994) (*DeShaney* test looks to extent of state's exercise of dominion and control over individual). In addition, the injury occurred when Daniel was released into the custody of his father for court-ordered visitation, not upon being placed with a third person or foster parent. Unlike the *Taylor* situation where the Department selected a foster parent for the child, it did not have the luxury of choosing Daniel's natural parents in this case.

Because the Respondents did not restrain Daniel's liberty as in the typical foster care situation, the *Taylor* case does not control here. The Respondents did not substitute themselves as Daniel's primary caregiver and render him wholly dependent upon them. Petitioner does not allege that Daniel suffered any harm while in the actual physical custody of the Appellants. The only harm at issue here was that inflicted by Daniel's father which occurred in a state over two thousand miles away, outside the physical custody of the Respondents. These facts distinguish this case from *Taylor, supra,* and bring it squarely into the rationale expressed in *DeShaney, supra.* In the absence of a significant curtailment of Daniel's liberty, the Due Process Clause is not implicated here. Notwithstanding the Respondents' legal custody of Daniel, Petitioner could continue to monitor Daniel's needs and could take action if she believed that imminent harm from his father might result during visitation, *cf. Taylor,*

818 F.2d at 797 (child placed in a foster home is at the mercy of the foster parents).

Four circuit courts of appeal have used *DeShaney, supra,* to find a distinction between situations where a child is totally dependent upon the state for security needs and situations where the primary responsibility for care remains with a natural parent. *Russell v. Fannin County School Dist.*, 784 F. Supp. 1576 (N.D.Ga.), *aff'd without opinion* 981 F.2d 1263 (11th Cir. 1992); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990). Each of these cases involved children who were harmed by public school teachers. The plaintiffs in these cases attempted to hold school system officials liable based upon the custodial relationship which existed between the school system and the child, especially in light of state compulsory attendance laws. The courts uniformly held that substantive due process did not furnish the plaintiffs a basis to recover against the school systems because the state had not rendered the child totally dependent upon the state. The present case is even further removed from such liability since Daniel died at the hands of his father, not a state actor. *See Black by Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993).

The case *sub judice* is sufficiently analogous to the public school cases to warrant concluding that Petitioner has no claim under substantive due process. There, like here, the children remained in the physical custody of their parents who were free to take steps to protect them from harms perpetrated by other persons. The key inquiry is whether the Respondents controlled Daniel's

life to such an extent that Petitioner could not reasonably be expected or able to protect him. The plain answer is that they did not. By means of the juvenile court, or the superior court in the divorce proceedings, Petitioner was free to modify the visitation arrangement established by Respondents. She could continuously monitor Daniel's condition, and could obtain relief if she chose to do so. However, she did not, and Respondents should not bear the liability for her own failure to act. Notably, the day before Daniel's abduction, Petitioner voiced no concerns at all regarding Michael Wooten's visitation with Daniel outside the offices of Respondents. Appendix, at p. 5a.

Neither is this a situation where Daniel was placed into a position of known danger. Although the district court focused on the potential for Daniel's abduction, that is not the harm alleged by Petitioner. She seeks recovery for Daniel's death. Respondents had no reason to anticipate that Daniel's father posed any threat of physical harm to the child at the time of the visitation on January 31, 1991. Moreover, Respondents dispute the district court's unsupported finding that a risk of abduction was presented. Mr. Wooten had gone to extraordinary lengths to assure that Daniel was returned to Petitioner's custody after a prior overnight visit. At no time did Petitioner take any steps to challenge the practice of allowing visitation outside the office, or question the Respondents' interpretation of the juvenile court's order that out of office visitation was permissible.

Only by embracing the distinction established by the lower court will this Court strike an appropriate constitutional balance between a child's liberty interest in personal safety and the competing liberty interests of a

parent to have access to his child. Petitioner would put Respondents in the position of a court when deciding questions of visitation, yet not accord any of the judicial immunity which insulates a court from making such discretionary decisions. From a public policy standpoint, such a scenario compels all state social workers to have every decision about a child made by a court and that is an unworkable solution.

Respondents at the local level could not simply ignore Michael Wooten's right to visit with his child when they had no indication that he posed a threat of physical harm to Daniel. To do so would deprive Mr. Wooten of his constitutional liberty interest in continuing his relationship with his child. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Courts have denied qualified immunity to state social workers when they separated a child and parent in the past. *See Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990). Now Petitioner asks the Court to hold Respondents liable when they kept a family intact. The Court should not subject state caseworkers to liability for the actions of Daniel's father. Daniel was not made wholly dependent upon Respondents for his safety. Petitioner had equal, if not greater access to the courts given her legal representation. She was not precluded from assuring that Daniel was treated fairly and properly by Respondents' intervention. Substantive due process does not furnish Petitioner a remedy where physical custody of Daniel remained with his natural parent who was still able to protect him.

VII. CONCLUSION

The court of appeals properly concluded that the Due Process Clause does not furnish Appellee a remedy

enforceable under 42 U.S.C. § 1983 for a deprivation of substantive due process principles when the state has not restricted the liberty of a child to such an extent that he is unable to protect himself. Petitioner was able to safeguard Daniel Wooten to the same extent as the Respondents here, since she maintained physical custody. Arguably, she was in an even better position to do so since she could monitor his situation on a daily basis and was familiar with the conduct and behavior of her husband, Michael Wooten. She should not be permitted to recover damages from Respondents when she failed to take any steps to protect the child beyond those which Respondents undertook.

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied, or alternatively the decision of the United States Court of Appeals for the Eleventh Circuit should be summarily affirmed.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

WILLIAM C. JOY 405500
Senior Assistant Attorney General

WILLIAM M. DROZE 231039
Assistant Attorney General
Counsel of Record

Please Address All
Communications to Counsel of Record:

WILLIAM M. ĐROZE
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 651-6198

APPENDIX

CASE REVIEW

96-272 [ ]
INTERIM [✔]

Date of Review: *1-30-91*

CWID No.: _____

Child's Name *Daniel Wooten* Case No.: *9689*
Date of Birth *6-24-86* Sex *Male*

Parent(s)/Guardian *Mike Wooten*
Sybille Wooten

County of Financial Responsibility *N/A* Boarding County *N/A*

Authority for Placement:

[ ] Voluntary Agreement Date _____ Temporary Custody
_____ Permanent Release

[✔] Court Order Date *7-27-90* Temporary Custody
_____ Permanent Custody

Court Requirements, if any: *parents to continue counseling, Allen Wooten to have no contact with dept. Mr. Wooten to 500.02 per month child support to dept. to send to mother.*

INITIAL REASON FOR PLACEMENT:

Father arrested for interference of custody – Allegations made by father of the mothers physical & emotional abuse of Daniel.

1. PLACEMENT HISTORY IN FOSTER CARE

Date Child Entered Foster Care *N/A*

Beginning Date	Ending Date	Type	Reason for Termination
N/A	*N/A*	*N/A*	*N/A*

SPECIAL NEEDS OF CHILD

A. School: Grade Level *N/A* Performance *N/A*
Problems, if any *Daniel attends daycare and has adjusted well.*

B. Health: Date of last physical *11-90*
Findings

Body weight a little low – gave vitamins with iron

Provider's name and address *North Fulton Pediatric's*
11685 Alpharetta Hwy Suite 180 Roswell Ga 30076 442-1050
Other physician's seen; name and address

Dentist's name and address *M. Amelia Grant DMD* Last exam 10-90
2500 Old Alabone Rd Roswell Ga. 30076 992-3711

Psychologist's name and address *Nancy Aldridge*
211 Grove Street Decatur, GA 30030

C. Child's Understanding/Adjustment to Placement *Daniel seems to have settled down. He seems to be happy in his placement with his mother.*

3. REASON CHILD IS CURRENTLY IN FOSTER CARE

Father arrested for interference of custody – allegations made by father of the mothers physical & emotional abuse.

A. Does child receive special perdiem boarding rate? __ Yes ✔ No

B. If yes, why? *N/A*

Mother stated Daniel has said he doesn't want overnight visits – He wants to see his Daddy but just have visits. Mr. Wooten said Daniel enjoyed visits. Mr. Wooten said he had wrote Daniel letters abt I love you – & on one occasion he said Daniel can't have – why Mama gets mad–

Mrs. Hicks said she approached Daniel first abt overnight visits & He said no. When asked why He said he was afraid Daddy wouldn't bring him back.

Mrs. Hicks said that Nancy Aldridge asked to see Mr. Wooten – Mr. Wooten has continued to see Dr. Jordan – Dr. Jordan did not feel it would be a ~~probably~~ problem with Mr. Wooten seeing Nancy Aldridge He said Dr. Jordan questioned Nancy Aldridges ability & qualifications to deal with these problems. "If I was having major surgery I wouldn't go to one

doctor – He feels this is more imp." He wants Daniel to see Dr. Jordan. He would like Dr. Jordan to go with him to see Nancy Aldridge.

Mr. Wooten said his house was not completely furnished because Mrs. W got the furniture at the divorce. He wants ~~oky~~ to be able to choose to to [sic] the Grandmothers –

Therapist recommended preplan visit overnight visits just 1 night – after Daniels visit he is more aggressive.

4. CURRENT PLACEMENT

A. Is the placement the most family-like setting available? ✔ Yes _ No
(Explain) *Child is placed with mother*

B. Is it close to the parent's home? ✔ Yes _ No
(Explain) *Child is placed with mother*

C. Caseworker's exploration of relative resources
N/A

9. A. SIX-MONTH PLAN.

_____ Return to Birth Family _____ Adoption

___✔___ Continue in Foster Care _____ Other

_____ Long-Term Foster Care Agreement Signed _____

B. LONG-RANGE PERMANENCY PLAN.
Anticipated Date of Achievement _____

_____ Return to Birth Family _____ Adoption

_____ Planned foster care with signed long-term foster care agreement.

✔ Other (Explain) *Continue to hold custody until dispute is settled in court.*

10. SERVICE AGREEMENT. Describe how child and parents participate in case planning.

Barriers	Plans to Overcome	Whose Responsibility	Time Frame
Custody dispute	*Waiting to go to Court 2 people need to be disposed & Court date set*	*Parents*	*6 months*
Visitation With Father	*Mr. Wooten will get his house ready for inspection by the Dept. for overnight visits*	*Mr. Wooten*	*2 months*
	In the Interim Mr. Wooten will be allowed 2 hrs. visit away from office	*Mr. Wooten & Agency*	*On going*

SUMMARY OF CASE REVIEW

This review has been summarized and the findings and recommendations have been explained to me. I will receive a typed copy of this review. If I do not agree with the typed copy or if I have questions, I understand that I can contact my caseworker within ten days.

If for any reason you disagree with this decision, you may request a hearing. You may request a hearing orally or in writing by contacting this agency within thirty days of the date given at the top of this form. This agency will be glad to furnish the necessary form(s), help you in filing your appeal, and assist you in any way possible to prepare for the hearing.

The hearing will be held in your county by a hearing officer. You may be represented at the hearing by legal counsel, a friend, or other spokesperson. If you would like to have an attorney, contact this agency which can provide information abut legal services which may be available in your community at no cost to you.

Panel Signatures:	Relationship:
**Betty Thomas*	*Chairperson*
Nancy Gilbert	*Recorder*
Ruth Y. Hicks	*Caseworker*

Parent Signatures:	
Sybille Wooten	
Michael D. Wooten	

Child Signature:	

Other Participants:	
Walker Bramlett	*guardian ad litem*

Release:

I/We give permission for the following persons to be present during the entire panel review.

_____ _____

_____ _____

Signed (Parents): _____

_____

* = CHAIRPERSON

NOTE: Do not date signatures

DEC 04 1990

North Georgia Psychological Services, Inc.
634 Green Street, N. E.
Gainesville, Georgia 30501

Telephone (404) 534-5262

GUY W. JORDAN, PH.D.
LICENSED PSYCHOLOGIST

JACK J. MIRABILE, PH.D.
LICENSED PROFESSIONAL COUNSELOR

November 27, 1990

Ms. Ruth Hicks
Forsyth Co. DFCS
PO Box 21
Cumming Ga 30130-0021

Re: Mike Wooten

Dear Ms. Hicks:

Mike Wooten has continued contact with me on a weekly and occasionally every two week basis since his court hearing. Mr. Wooten continues to express his strong desire to resume a normal relationship with Daniel. I see no danger to Daniel either physically or emotionally for increased or unsupervised contact with Mr. Wooten. In fact, the message to Daniel by the limited contact with his father may not be clear to Daniel, and the risk of damaging Daniel's trust of adults is increased. Reportedly, prior to involvement of DFCS Daniel had a good relationship with Mr. Wooten. A further delay in resuming a healthy relationship with Mr. Wooten risks further damage emotionally to Daniel. I will continue to discuss with Mr.

Wooten his role in dealing with Daniel and his appropriate management of situations which occur.

If you have any questions, please contact me.

Sincerely,

/s/ Guy W. Jordan PhD
Guy W. Jordan, PhD

Georgia Child Death Review Team: Form #1: Child and Death Information only: FORSYTH Date of team review: 05/14/91

Victim Identification 1) Name WOOTEN (last), DANIEL (first), M. (m).

Case # 91-058-001

DOB 05/20/86 4) DOD 03/24/91 5) Age 4 6) Sex m 7) Race w

SSN# 253-73-8327 9) Educational level pre-school

Significant Others

Name	Rltshp	Age	Sex	Race	In Home	SSN	Educational Level
SYBIL WOOTEN	1	34	F	W	Yes	312-82-7797	College (2yrs)
MICHAEL WOOTEN	1	36	M	W	No	409-92-6342	Degree(Engin)

I. Death Information

Category of Death (as determined by Medical Examiner, Coroner or Physician)

a) Medical causes, Diseases or Natural causes __ SIDS? __

b) Homicide XX, Child Abuse or Neglect? Suspected __, Confirmed XX
(if yes for any item in b, then complete item VI)

c) Suicide __

d) Accident __

e) Undetermined __

f) Pending __

Cause of death (as stated on the death certificate)

a) GUN SHOT WOUND TO THE HEAD

b) _____

c) _____

Circumstances of Death: Place of Death _____

County of death COCHISE Time of Death 2:30AM AM/PM

a) Child abuse/neglect related? (Confirmed/Suspected/No/Uk)
(if Confirmed or Suspected then complete item VI)

b) Alcohol or substance abuse related? (Y/N/Uk)

c Trauma? (Y/N/Uk)

d) Adequate care/supervision at time of death? (Y/N/Uk)

e) Was death witnessed? (Y/N/Uk)

Narrative: Michael Wooten did not return child after a visit, absconded with the child, whereabouts unknown. Contact was made with child and father in Cochise County, Arizona, later a confrontation with law enforcement in an attempt to recover child, father shot child and then himself rather than surrender child.

Medical Examiner/Coroner Report: Deceased weight (lbs) __ height __

Autopsy (Y/N/Uk) Findings: death caused by gun shot wound to head.

Drug/Tox Screen (Y/N/Uk) Findings: No drugs or toxicity present.

STD screen (Y/N/Uk) Findings: Negative

Death Scene Invst (Y/N/Uk) Findings: Gun shot wound, no further significant findings

Maternal Information: Age 34 Race M Maiden Name HERMAN

of Children xxxxxxxDead 1 Marital Status (xxx M/ xxx/ other)

Employed? (Y/xxxxx) WIC? xxx/N/xxx Medicaid? xxx/N/xxx) AFDC? (xxx/N/xxx)

Education level 2 years of college

Complete following for victim < 1 Delivery Hospital Northside hospital

birth wt. (lbs) _____ Prematurity or LBW? (Y/N/Uk) if yes then Weeks Gest.

Prenatal exposure to alcohol/drugs/tobacco (Y/N/Uk) if y specify _____ Maternal Prenatal Care (Y/N/Uk) # of visits ____

trimester of 1st visit (1/2/3)

Form #1: Child and Death Information

II. Child Abuse and Homicide Perpetrator information

Age 36 Race w Sex M Relationship Father

Prior criminal history	(Y/N/Undk)	
Prior history of child abuse or neglect	(Y/N/Undk)	None substantiated
History of alcohol or substance abuse	(Y/N/Undk)	
Prior history of domestic violence or other violence	(Y/N/Undk)	
Is alleged perpetrator a caretaker of other children	(Y/N/Undk)	

III. Child Death Factors (all pertain to deceased unless specified, otherwise

Please explain any marked yes

		Explanation
a) HX of Abuse/Neglect of deceased	(Y/N/Undk)	Allegations in 05/90 to DOD
b) Disability or handicap	(Y/N/Undk)	
c) Significant medical condition	(Y/N/Undk)	
d) HX of abuse/neglect in siblings	(Y/N/Undk)	
e) HX of family violence	(Y/N/Undk)	
f) HX of serious injury	(Y/N/Undk)	
g) Unexpected death of a sibling	(Y/N/Undk)	
h) alcohol/drug abuse by deceased	(Y/N/Undk)	
i) Prenatal exposure drugs/alcohol	(Y/N/Undk)	

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VIII. Agency Involvement (with victim or family; check all that apply)

Agency Name	Before Death	After. Death	Agency Contacted?	Services Appropriate? Y/N/Undt
1. DFCS	XX	XX	XX	Y-locally
a. CPS	XX			Y
b. Placement	XX			Y
c. Payment/Assistance				
2. Police/Law Enforcement	XX	XX	XX	Y
3. District Attorney	XX	XX	XX	Y
JUVENILE				
4. Courts (specify which)	XX		XX	Y
a. Superior	XX		XX	Y
5. Public Health			XX	Y
6. Mental Health	PRIVATE		XX	N/A
7. Hospital/Clinic	XX			
8. General Medical Care	XX			
9. Military				
10. CASA				
11. School	DAYCARE			Y
12. ME/Coroner	(ARIZONA)	XX	XX	Y
13. PRIV. PSYCHOLOGIST	XX		XX	Y

For any Agency involved fill in Form #2: Agency form (or agency specific form _____)

IX. Preventability

1. The death was preventable as determined by the death review team (Check _____)
   a. Definitely ( ) b. Probably (xxx) & c. Probably Not (xxx)
   d. Definitely Not ( ) e. Undetermined ( )
2. If a or b, how could the death have been prevented?

(SEE ATTACHED)

3. Recommendations

(SEE ATTACHED)

4. Attachments Death Certificate xx Autopsy report xx Form #2 (#) _____
   Agency Forms (# & agencies DFCS & LAW ENFORCEMENT) Other _____

IX. PREVENTABILITY

2. Members of the Fatality Review Team were tied on section IX. 1.B. & C.. However, members voting that the death was "Probably Not" preventable included comments in section IX. 2. as to how the death could have been prevented. Suggestions of all members were as follows:

> SUPERVISION: Father's visits should have been under the supervision of DFCS as previously ordered by the Court. If there is a discrepancy in the interpretation of "Supervisied [sic] Visits", then that should be clarified.
>
> Father should have had supervised visits until Divorce and Custody issues were final in all Courts involved.
>
> State Office level DFCS should not make visitation/placement decisions or recommendations and/or pressure (indirectly or directly) local agency unless an official appeal is made to them in writing.
>
> Child could have been in a foster home placement until issues and divorce was resolved; placing more interest in the best interest of the child rather than unification.
>
> LAW ENFORCEMENT: Clear communications between all LE agencies and states to make all aware of potential danger to a child. There should be a way to specify between routine custody interference and potentially dangerous situations.
>
> DA/JUDICIAL: One court dealing with such situations would serve better in that everyone

would be aware of all concerns in a particular case, ie. Family Court.

The Courts should not rely on psychological findings to determine appropriate custodian.

MEDIA: News media should have published photos and news reports upon the recommendation and request of local law enforcement agency instead of determining such cases unnewsworthy because it was a custody case.

X. RECOMMENDATIONS

Leave DFCS to handle WIC, AFDC and other assistance. Create a new agency to handle child protection. The role of "Reuniting the family" is detrimental to the child in *all cases* where protection of the child is needed.

Give immunity to DFCS workers. Fear of legal liability is uppermost in their minds and takes precedent over interest of the child.

All children in a deprived situation or alleged deprived situation should have an independent guardian ad litem.

Make it a violation of criminal law for a parent to remove a child while a divorce action is pending.

Local case managers should have more latitude in making decisions on their cases.

Have inter-agency staffings on all cases.

Have an independent, unbiased psychologist to evaluate all parties involved in custody issues.